TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907

No. 1167.

E. L. VAIL, PHIL S. HUGHES, AND C. F. RICHARDSON, AS SUPERVISORS OF PIMA COUNTY, ARIZONA, APPELLANTS,

vs.

THE TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JULY 19, 1907.

(20,310.)

(20,310.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 345.

E. L. VAIL, PHIL S. HUGHES, AND C. F. RICHARDSON, AS SUPERVISORS OF PIMA COUNTY, ARIZONA, APPELLANTS,

vs.

THE TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 20, 1907.

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a In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors Pima County, Arizona, Defendants.

Transcript of Record.

1 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors Pima County, Arizona, Defendants.

Complaint.

Comes now the above named plaintiff by E. S. Clark, Attorney General, and for cause of action alleges:

I.

That said defendants are now, and that they and their predecessors in office have been, at all the times herein mentioned, the duly qualified and acting supervisors of the County of Pima, in the Territory of Arizona.

II.

That heretofore, to-wit: on and prior to March 13th, 1903, the said County of Pima was lawfully indebted to various and divers persons on certain bonds, known and designated as Pima County Railroad subsidy bonds, issued by said County of Pima prior to December 31, 1890, which said bonds were in the hands of innocent purchasers thereof for value, and were legal, valid and subsisting obligations against the County of Pima; said bonds amounting on the
2 13th day of March, 1903, principal and interest, according to the terms of said bonds to the sum of three hundred, nineteen thousand, seven hundred and ninety-one and twenty-three one-hundredths ($319,791.23) dollars.

III.

That on the 13th day of March, 1903, the Loan Commission of the Territory of Arizona, upon the request of the owners of the railroad subsidy bonds aforesaid, and in manner and form as provided by law, duly and legally funded said railroad subsidy bonds of the said county of Pima by exchanging therefor 318 territorial funding bonds of said Territory of Arizona of the denomination of one thousand ($1000) dollars each, and one bond or obligation for the sum of two hundred and seventy-five and 29/100 ($275.29) dollars, each

bearing interest at the rate of three per cent. per annum, said interest payable semi-annually, to-wit: On the 15th days of January and July in each year after the issuance of said bonds until paid.

That the said loan commission also expended in funding said railroad subsidy bonds as aforesaid, for printing said territorial funding bonds, the sum of four hundred and forty-six dollars.

IV.

That the said loan commission of Arizona thereby and in manner and form as aforesaid, funded 150 of said railroad subsidy bonds of said Pima county, of the denomination of one thousand
3 ($1000) dollars each, together with the accrued interest thereon as evidenced by the coupons attached thereto, all amounting to the sum of three hundred and nineteen thousand, seven hundred and ninety-one and 23/100 (319,791.23) dollars.

V.

That by reason of the funding of said bonds, as aforesaid, and the issuance of 319 territorial funding bonds of said Territory of Arizona, there became due and payable thereon according to the tenor thereof, on the 15th day of January, 1904, the sum of nine thousand, five hundred and forty-eight and 26/100 ($9,548.26) dollars, and thereafter, on the fifteenth day of January and July in each year subsequent thereto, there became due and payable to the holders of said territorial funding bonds, as interest thereon, according to the terms and conditions thereof, the sum of four thousand seven hundred and seventy-four and 13/100 ($4,774.13) dollars, payable at the office of the territorial treasurer of the Territory of Arizona.

VI.

That pursuant to the statute in such cases made and provided, and in compliance with the terms and conditions of said funding bonds so issued as aforesaid, the treasurer of the Territory of Arizona has duly paid all of the interest due on said bonds at the times when said interest has become due and payable, according to said terms and conditions, said interest so paid amounting in all at the present time to the sum of $19,096/51 dollars, and has taken up and can-
4 celled the interest coupons attached to said bonds to that extent and for that amount, and has also paid the sum of $446 for printing said funding bonds.

VII.

That upon the issuance of said territorial funding bonds, as aforesaid, it became and was the duty of the board of supervisors of the County of Pima to levy annually upon the taxable property in said county a sufficient tax, in addition to all other taxes, to pay the interest on said bonds so issued by the territory, as aforesaid.

VIII.

That for the year 1903, the territorial board of equalization of Arizona, at its regular annual session for that year, fixed the rate

of taxes for territorial purposes to be levied and collected in each county in said territory, and duly levied, as plaintiff is informed and verily believes, as a part of said territorial tax, the sum of fifty-two cents on each one hundred dollars' valuation of the taxable property in said county of Pima, for the purpose of paying the interest on the funded indebtedness of the said county of Pima, including interest on the funding bonds heretofore mentioned, accruing during the year 1903, and until January 15th, 1904, and the territorial auditor of the said territory duly certified the levy of said tax aforesaid to the county board of supervisors of said county of Pima, for the purpose of having the said board of supervisors levy said tax and include it in the tax roll for that year; that
5 thereupon the supervisors of said county of Pima unlawfully and wrongfully refused and neglected to levy said tax of 52¢ on each one hundred ($100.) dollars valuation of the taxable property in said county of Pima to pay said interest aforesaid, but levied only the sum of 30¢ on each one hundred ($100.) dollars valuation of said county, which levy was insufficient to raise the amount of money required to pay the interest on the funded indebtedness of the said county of Pima and wholly inadequate and insufficient to pay the interest on the funding bonds heretofore described.

IX.

That for the year 1904, the territorial board of equalization at its regular annual session, duly levied fifty-four cents on each one hundred ($100.) dollars of valuation of the taxable property in said county of Pima for the purpose of paying the interest on the funded indebtedness of said county of Pima, including the interest on the funding bonds aforesaid accruing during the year 1904 and until January 15th, 1905, and the territorial auditor of the said territory of Arizona duly certified the levy of said tax to the county board of supervisors of said county of Pima; that thereupon the said supervisors of Pima County, unlawfully and wrongfully refused and still refuse to levy said tax of fifty-four cents on each one hundred ($100.) dollars of valuation on the taxable property of said county of Pima,
6 or to make the levy for the year 1903, as hereinbefore described to pay the interest on the territorial funding bonds aforesaid; and, as plaintiff is informed and verily believes, said supervisors will not levy the tax aforesaid to pay the said interest unless compelled so to do by the mandate of this court; that said defendants assert and claim that they do not intend to and will not levy said tax for the purpose of paying the interest on the funding bonds aforesaid.

X.

Plaintiff further alleges that it became and was the plain duty of said board of supervisors to levy the said tax of fifty-two cents on each one hundred dollars of valuation for the year 1903 for the purpose of paying the interest on said territorial funding bonds, and also to levy said tax of fifty-four cents on each one hundred dollars of valuation upon the taxable property in said county of Pima to pay said

interest for the year 1904; and that said board of supervisors should, during the year 1905, and each year thereafter during the term of said funding bonds, levy such tax as may be fixed by the territorial board of equalization for the purpose of paying the interest on said funding bonds.

XI.

Plaintiff further alleges that it has no plain, speedy and adequate remedy at law; that it is the party beneficially interested in the payment of the interest aforesaid, and the expense of printing said funding bonds, to the Territory of Arizona.

7 Wherefore, plaintiff prays that a writ of mandate issue out of this honorable court, directed to the said defendants and each of them, commanding them in due season to convene as a board of supervisors and to levy and assess upon the taxable property of the said county of Pima the sum of fifty-two cents on each one hundred dollars of valuation therein, for the purpose of paying the interest on the said funding bonds for the year 1903, and also to levy and assess upon said taxable property in the county of Pima the further sum of fifty-four cents on each one hundred dollars of valuation therein for the purpose of paying the interest on the said funding bonds for the year 1904, and also to levy and assess upon the taxable property in the county of Pima for the year 1905, and each year thereafter during the life of said funding bonds, such tax as may be fixed by the territorial board of equalization from year to year for the purpose of paying the interest on said funding bonds, and the cost of printing the same.

For costs of suit, and for such other and further relief as to the court may seem just and proper in the premises.

THE TERRITORY OF ARIZONA,
By E. S. CLARK, *Its Attorney General.*

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

E. S. Clark, first having been duly sworn, upon his oath says: That he is the Attorney General of the Territory of Arizona;

8 that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, save and except as to those matters therein alleged upon information and belief, and as to those matters that he believes it to be true.

E. S. CLARK.

Subscribed and sworn to before me this 31st day of March, A. D., 1905.

My commission expires Oct. 1st, 1907.

W. A. HILL,
[SEAL.] *Notary Public.*

Upon reading the foregoing petition, duly verified, and it manifestly appearing therefrom that sufficient grounds exist therefor, it is

Ordered, that an alternative writ of mandamus issue, returnable before the Supreme Court of the Territory of Arizona, on the — day of ——, 1905, at the hour of — o'clock A. M.

——— ———,

Chief Justice of the Supreme Court.

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff *vs.* E. L. Vail, *et al.*, as Supervisors of Pima County, Arizona, Defendants. Complaint. Filed April 1, 1905. S. M. Cullom, Clerk.

9 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,

vs.

E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Writ of Mandamus.

The Territory of Arizona to E. L. Vail, Phil S. Hughes and C. F. Richardson, Supervisors of the County of Pima, Arizona, Greeting:

Whereas, it manifestly appears to the court by the affidavit of E. S. Clark, Attorney General of the Territory of Arizona, on the part of said Territory of Arizona, the plaintiff, and the party beneficially interested herein, that the defendants E. L. Vail, Phil S. Hughes and C. F. Richardson, are the supervisors of the county of Pima, in said Territory, and constitute the board of supervisors of said county, and that heretofore, to-wit: On the 13th day of March, 1903, said county of Pima was indebted to divers and various persons upon certain bonds known and designated as Pima County Railroad Subsidy Bonds, issued by said County of Pima prior to December 31st, 1890, and amounting on said 13th day of March, 1903, to the sum of three hundred and nineteen thousand, seven hundred and ninety-one and 23/100 dollars ($319,791.23), and that the holders
10 and owners of said bonds had theretofore applied to the Loan Commission of the Territory of Arizona to have said bonds of the County of Pima funded, and that on said 13th day of March, 1903, said loan commissioners of the Territory of Arizona duly funded one hundred and fifty (150) of the aforesaid outstanding bonds of said Pima county, each of the denomination of one thousand ($1,000) dollars, together with the accrued interest thereon, amounting at that date to three hundred and nineteen thousand seven hundred and ninety-one and 23/100 ($319,791.23) dollars, by then and there delivering to the owners and holders of the aforesaid bonds three hundred and eighteen (318) territorial funding bonds of the Territory of Arizona of the denomination of one thousand ($1,000) each, and one fractional funding bond of the Terri-

tory of Arizona for the sum of two hundred and seventy five and 29/100 ($275.29) dollars, each and all of said bonds bearing interest at the rate of three (3) per cent. per annum from January 15, 1903, said interest payable semi-annually on the fifteenth days of January and July of each year thereafter until the maturity and payment of said bonds.

That by reason of the funding of said bonds as aforesaid, and the issuance of said territorial funding bonds by the Territorial Loan Commission, the said County of Pima became and was obligated to pay the interest due on said funding bonds according to the tenor thereof, on the 15th days of January and July in each year thereafter, and that said County of Pima thereby became obli-
11 gated to pay to the Territory of Arizona on the 15th day of January, 1904, the interest due on said funding bonds, amounting at that time to the sum of nine thousand five hundred and forty eight and 26/100 ($9,548.26), — and on July 15th and January 15th in each year thereafter it became and was and is obligated to pay the sum of four thousand seven hundred and seventy four and 13/100 ($4,774.13) dollars, interest as aforesaid, which amounts it became and was and is the duty of the taxing officers of said Pima county to levy and collect and pay over to the treasurer of the Territory of Arizona.

That for the year 1903, the Territorial Board of Equalization at its regular annual session, duly levied fifty-two cents on each one hundred dollars of valuation of the taxable property in said county of Pima for the purpose of paying the interest on said territorial funding bonds and one fractional bond aforesaid, accruing during the year 1903-4, and the territorial auditor of said territory duly certified the levy of said tax to the county board of supervisors of said county of Pima; that the said supervisors of Pima county thereupon unlawfully and wrongfully refused and neglected to levy the said sum of fifty-two cents on each one hundred dollars of valuation of taxable property in said county, but only levied the sum of thirty cents on each one hundred dollars of valuation in said county, which amount so levied as aforesaid was insufficient to pay the interest on the funded indebtedness of said county, and wholly inadequate and insufficient to pay the interest on said 319 funding bonds
12 aforesaid; that for the year 1904 the Territorial Board of Equalization of the Territory of Arizona, at its annual session, duly levied fifty-four cents on each one hundred dollars of valuation of the taxable property in the said county of Pima for the purpose of paying the interest on the funded indebtedness of said county of Pima, including interest on the 319 funding bonds aforesaid for the year 1904-5, and the territorial auditor of said territory duly certified the levy of said tax to the county board of supervisors of said Pima county; that thereupon said supervisors unlawfully and wrongfully refused and neglected to levy the said tax, or any tax, for the purpose of paying the interest on said funding bonds; that all of the interest due on said funding bonds has been duly paid by the treasurer of the Territory of Arizona as the same became due and payable, and that said treasurer has at the present time

paid for interest due on said funding bonds as the same became due and payable, the sum of $19,096.51, and that there is now due and owing to said territory from the county of Pima, for interest paid as aforesaid, the sum of $19,096.51, and the further sum of $446 for printing said funding bonds, which sum has likewise been paid by the territorial treasurer.

That it is the plain duty of the supervisors of said county of Pima to levy and assess upon the taxable property of said county of Pima a tax sufficient to pay said interest and the further sum of $446 for printing said bonds, all of which is due to the Territory
13 of Arizona from said county of Pima as aforesaid.

That it appears from said affidavit that the sum of fifty-two cents on each one hundred dollars of valuation of the taxable property in said county of Pima should be levied for the purpose of paying the interest due on said funding bonds for the year 1903, and that there should be levied and assessed upon the taxable property of said county of Pima the sum of fifty-four cents on each one hundred dollars of valuation in said county for the purpose of paying interest due on the funding bonds aforesaid for the year 1904, and that there should be levied and assessed upon the taxable property of said county of Pima for the purpose of paying said interest for the year 1905, and for each year thereafter during the life of said funding bonds, such sums as may be levied by the Territorial Board of Equalization for that purpose. That said Board of Supervisors has refused and still refuses to levy said taxes or any part thereof upon the taxable property in the county of Pima, and that plaintiff has no plain, speedy and adequate remedy in the ordinary course of law.

Therefore, we do command you, that in due season after the receipt of this writ, you do convene as the board of supervisors of Pima county, and levy and assess upon all the taxable property in said county the sums hereinbefore mentioned or that may be hereafter levied by the Territorial Board of Equalization for the purpose of paying the interest due on the territorial funding bonds afore-
14 said, for the years 1903 and 1904, and thereafter, and that you duly certify said levies to the county treasurer and *ex-officio* tax collector of said county of Pima, or that you show cause before this court on the 25th day of May 1905, at the hour of 10 o'clock A. M. why you have not done so.

Witness the Honorable Edward Kent, Chief Justice of the Supreme Court of Arizona, and the seal of said Court, this 1st day of April, A. D., 1905.

[SEAL.]

S. M. CULLOM,
Clerk Supreme Court.

OFFICE OF THE SHERIFF OF PIMA COUNTY, ARIZONA.

I hereby certify that I received the within writ of mandate on the 7th day of April, 1905, and that I personally served the same by delivering to E. L. Vail, Phil S. Hughes and C. F. Richardson, the defendants named in said writ, a true copy of said writ of mandate

accompanied by a true copy of the complaint in said action in Pima County, Arizona, on the 7th day of April, 1905.

Dated Tucson, Arizona, April 7th, 1905.

NABOR PACHECO, *Sheriff*,
By HENRY MEYER, *Deputy*.

(Endorsed:) Original. No. 903. In the Supreme Court of Arizona, Territory of Arizona *vs.* E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona. Writ of Mandate. Filed Apr. 14th, 1905. S. M. Cullom, Clerk.

15 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Amended Complaint.

Comes now the Territory of Arizona, by E. S. Clark, its Attorney General, and files this, its amended complaint herein, and alleges:

I.

That said defendants are now, and that they and their predecessors in office have been, at all the times herein mentioned, the duly qualified and acting supervisors of the County of Pima, in the Territory of Arizona.

II.

That heretofore, to-wit: on and prior to March 13th, 1903, the said County of Pima was lawfully indebted to various and divers persons on certain bonds, known and designated as Arizona Narrow Gauge Subsidy bonds, issued by said County of Pima prior to December 31st, 1890, under an act of the legislative assembly of Arizona, entitled "An Act to promote the construction of a certain rail-
16 road," approved February 21st, 1883, which said bonds were in the hands of innocent purchasers thereof for value, and were legal, valid and subsisting obligations against the County of Pima; said bonds amounting on the 13th day of March, 1903, principal and interest, according to the terms of said bonds to the sum of three hundred, nineteen thousand seven hundred and ninety-one and twenty-three one hundredths ($319,791.23) dollars.

III.

That on the 13th day of March, 1903, the Loan Commission of the Territory of Arizona, upon the request of the owners of the railroad subsidy bonds aforesaid, and in manner and form as provided by law, duly and legally funded said railroad subsidy bonds of the said County of Pima by exchanging therefor 318 territorial funding bonds of the Territory of Arizona of the denomination of one thousand ($1000) dollars each, and one bond or obligation for the sum

of two hundred and seventy-five and 29/100 ($275.29) dollars, each bearing interest at the rate of three per cent. per annum, said interest payable semi-annually, to-wit: On the fifteenth day of January and July in each year after the issuance of said bonds until paid. That the said loan commission also necessarily expended in funding said railroad subsidy bonds as aforesaid, for printing said territorial funding bonds, the sum of four hundred and forty-six dollars.

IV.

That the said Loan Commission of Arizona thereby and in
17 manner and form as aforesaid, funded 150 of said railroad subsidy bonds of said Pima County, of the denomination of one thousand ($1000) dollars each, together with the accrued interest thereon as evidence- by the coupons attached thereto, all amounting to the sum of three hundred nineteen thousand, seven hundred and ninety-one and 23/100 ($319,791.23) dollars.

V.

That by reason of the funding of said bonds, as aforesaid, and the issuance of 319 territorial funding bonds of said Territory of Arizona, there became due and payable as interest thereon according to the tenor thereof, on the 15th day of January, 1904, the sum of nine thousand, five hundred and forty-eight and 26/100 ($9,548.26) dollars, and on the 15th day of January and July in each year subsequent thereto, there became due and payable to the holders of said territorial funding bonds, as interest thereon, according to the terms and conditions thereof, the sum of four thousand, seven hundred and seventy-four and 13/100 ($4,774.13) dollars, all payable at the office of the territorial treasurer of the Territory of Arizona.

VI.

That pursuant to the statutes in such cases made and provided, and in compliance with the terms and conditions of said funding bonds so issued as aforesaid, the treasurer of the Territory of Arizona
has duly paid all of the interest due on said bonds at the
18 times when said interest has become due and payable, according to said terms and conditions, said interest so paid amounting in all at the present time to the sum of $19,096.51, and has taken up and cancelled the interest coupons attached to said bonds to that extent and for that amount, and has also paid the sum of $446.00 for printing said funding bonds.

VII.

That upon the issuance of said territorial funding bonds, as aforesaid, it became, and was, and is the duty of the Board of Supervisors of the County of Pima to levy annually upon the taxable property in said county a sufficient tax, in addition to all other taxes, to pay the interest on said bonds so issued by the Territory, as aforesaid.

VIII.

That for the year 1903, the territorial board of equalization of Arizona, at its regular annual session for that year, fixed the rate of taxes for territorial purposes to be levied and collected in each county in said territory, and duly levied, as plaintiff is informed and verily believes, as a part of said territorial tax, the sum of fifty-two cents on each one hundred dollars valuation of the taxable property in said County of Pima, for the purpose of paying the interest on the funded indebtedness of the said County of Pima, including interest on the funding bonds heretofore mentioned, accruing during the year 1903, and until January 15th, 1904, and the territorial auditor of the said territory duly certified the levy of said tax
19 aforesaid to the County Board of Supervisors of said County of Pima, for the purpose of having the said Board of Supervisors levy said tax and include it in the tax roll for that year; that thereupon the said Supervisors of said County of Pima unlawfully and wrongfully refused and neglected to levy said tax of fifty-two cents on each one hundred dollars valuation of the taxable property in said County, but levied the sum of only thirty cents on each one hundred dollars valuation of said County, which levy was sufficient to raise the amount of money required to pay the interest on all the funded indebtedness of the said County of Pima other that the territorial funding bonds issued in lieu of said Arizona Narrow Gauge subsidy bonds as aforesaid, but was wholly inadequate and insufficient to pay the interest on the funding bonds hereinbefore described, or any part thereof.

IX.

That for the year 1904, the territorial board of equalization at its regular annual session, duly levied fifty-four cents on each one hundred dollars of valuation of the taxable property in said County of Pima for the purpose of paying the interest on the funded indebtedness of said County of Pima, including the interest on the funding bonds aforesaid, accruing during the year 1904 and until January 15th, 1905, and the territorial auditor of the said Territory of Arizona duly certified the levy of said tax to the county board of supervisors of said County of Pima; that thereupon the said
20 supervisors of Pima County unlawfully and wrongfully refused and still refuse to levy said tax of fifty-four cents on each one hundred ($100) dollars of valuation on the taxable property of said County of Pima, but only levied a sum sufficient to pay the interest on all the funded indebtedness of said County other than the territorial funding bonds issued in lieu of said Arizona Narrow Gauge subsidy bonds as aforesaid, which said levy was wholly insufficient to pay the interest on said territorial funding bonds for said year, or any part thereof; and said board of supervisors then and there further refused to make the levy for the year 1903, as hereinbefore described, to pay the interest for that year on the territorial funding bonds aforesaid; and, as plaintiff is informed and verily be-

lieves, said supervisors will not levy the taxes aforesaid to pay the said interest unless compelled to do so by the mandate of this court; that said defendants assert and claim that they do not intend to and will not levy said taxes for the purpose of paying the interest on the funding bonds aforesaid.

X.

Plaintiff further alleges that it became and was the plain duty of said board of supervisors to levy the said tax of fifty-two cents on each one hundred dollars of valuation for the year 1903, for the purpose of paying the interest on said territorial funding bonds, and also to levy said tax of fifty-four cents on each one hundred dollars of valuation upon the taxable property in said County of Pima
21 to pay said interest for the year 1904; and that said board of supervisors should, during the year 1905, and each year thereafter during the term of said funding bonds, levy such tax as may be fixed by the territorial board of equalization for the purpose of paying the interest on said funding bonds, and the expense of printing the same.

XI.

Plaintiff further alleges that it has no plain, speedy and adequate remedy at law; that it is the party beneficially interested in the payment of the interest aforesaid, and the expense of printing said funding bonds, to the territory of Arizona; that neither the said County of Pima, nor any one in its behalf, has ever paid to the Territory of Arizona, or any one in its behalf, the sum of money paid out by the territorial treasurer of Arizona as set forth in paragraph VI of this complaint, or any part thereof, and that the same is wholly due and payable by said County of Pima to the said Territory of Arizona.

XII.

That prior to the institution of this action, demand was made by the Territorial Auditor, representing the Territory of Arizona, of the Board of Supervisors of Pima County, to levy the tax assessments as set forth herein, and said Board of Supervisors failed, neglected and refused to make said levy.

Wherefore plaintiff prays that a writ of mandate issue out of this honorable court, directed to the said defendants and each of
22 them, commanding them in due season to convene as a Board of Supervisors and to levy and assess upon the taxable property of the said County of Pima the sum of twenty-two cents, or such other sum as may — adequate and necessary, on each one hundred dollars of valuation therein, for the purpose of paying the interest on the said funding bonds for the year 1903, and also to levy and assess upon said taxable property in the county of Pima such further sum as may be adequate and necessary on each one hundred dollars of valuation therein for the purpose of paying the interest on the said funding bonds for the year 1904, and also to levy and assess upon the

taxable property in the County of Pima for the year 1905, and each year thereafter during the life of said funding bonds, such tax as may be fixed by the territorial board of equalization from year to year for the purpose of paying the interest on said funding bonds, and the cost of printing the same.

For costs of suit, and for such other and further relief as to the court may seem just and proper in the premises.

THE TERRITORY OF ARIZONA,
By E. S. CLARK, *Its Attorney General.*

TERRITORY OF ARIZONA, *County of Yavapai, ss:*

E. S. Clark, first having been duly sworn, upon his oath says: That he is the Attorney General of the Territory of Arizona; that he has read the foregoing complaint and knows the contents
23 thereof, and that the same is true of his own knowledge, save and except as to those matters therein alleged upon information and belief, and as to those matters that he believes it to be true.

E. S. CLARK.

Subscribed and sworn to before me this 10th day of May, A. D., 1905.

My commission expires June 24, 1907.

ALLEN HILL,
[SEAL.] *Notary Public.*

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona *vs.* E. L. Vail *et al.* Amended complaint. Filed May 12, 1905. S. M. Cullom, Clerk.

24 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL. S. HUGHES, and F. C. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Come now the defendants in the above entitled cause and demur to the First Amended Complaint of the plaintiff heretofore filed herein, and for cause of demurrer allege*s:*

That said Complaint does not state facts sufficient to constitute a cause of action.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

And answering said First Amended Complaint of plaintiff heretofore filed herein, and in bar of plaintiff's right to sue, defendants allege that on the 29th day of October, 1894, at Washington, D. C., in an action then pending on appeal in the Supreme Court of
25 the United States, between Charles Edward Lewis, as plaintiff and appellant, and Pima County, defendant and appellee, and concerning the validity of the Arizona Narrow Gauge Subsidy Bonds, which are the identical bonds alleged to have been funded by the Loan Commission of the Territory of Arizona, in the First Amended Complaint in this action filed, and on account of the funding of which this action is maintained, judgment was duly given and made by said Court to the effect that the Legislature of Arizona, under and by virtue of an Act of the Legislative Assembly of the Territory of Arizona, entitled: "An Act to promote the construction of a certain railroad," approved February 21st, 1883, exceeded its powers in authorizing and requiring Pima County to issue its bonds in exchange for those of the railroad company in question, and that the bonds were, and are, void.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

And further answering said First Amended Complaint of plaintiff heretofore filed herein, the defendants deny that on and prior to March 13th, 1903, or at any other time, the said County of
26 Pima was lawfully, or at all, indebted to various and diverse persons, or to any person, or persons, on certain bonds known as the Arizona Narrow Gauge Subsidy Bonds, or upon any railway subsidy bonds whatsoever. Defendants deny that any Arizona Narrow Gauge Subsidy Bonds alleged to have been issued by Pima County, or that any railway subsidy bonds of whatever character alleged to have been issued by said County, were, or are, in the hands of innocent purchasers thereof for value, or were, or are, in the hands of any purchaser, or purchasers, whomsoever, for value, or otherwise. Defendants deny that any Arizona Narrow Gauge Subsidy Bonds alleged to have been issued by said County, or that any other railway subsidy bonds of whatever character alleged to have been issued by Pima County, are now, or ever were, legal, valid or subsisting obligations against said County. Defendants deny that the amount of principal and interest due by said County of Pima upon the Arizona Narrow Gauge Subsidy Bonds, or upon any other subsidy railroad bonds alleged to have been issued by said Pima County, was on the 13th day of March, 1903, according to the terms of such alleged bonds, the sum of Three Hundred, Nineteen Thousand, Seven Hundred and Ninety-one and 23/100 ($319,791.23) Dollars, or any other sum of money whatsoever, on said date, or at any other time prior or subsequent thereto. Defendants deny generally and

specifically each and every the allegations contained in Paragraph II of plaintiff's said Complaint, save and only and except that defendants admit that said County of Pima, prior to December 31st, 1890, issued certain bonds, known and designated as Arizona Narrow Gauge Subsidy Bonds, under and by virtue of the act of the Legislative Assembly of Arizona, entitled, "An Act to promote the construction of a certain railroad," approved February 21st, 1883, and as to this admitted allegation, the defendants allege that the said Act of the Legislative Assembly of Arizona, was, and is, a void act, and that the bonds so issued by Pima County, under and by virtue of said Act were, and at all times have been, void, and without any force or effect whatsoever.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

TERRITORY OF ARIZONA, *County of Pima, ss:*

E. L. Vail, Phil S. Hughes, and C. F. Richardson, having been by me first duly sworn, on their separate oaths, each for himself and not one for the other, says: That he is one of the defendants in the above entitled cause, that he is one of the duly elected, qualified and acting Supervisors of Pima County, Territory of Arizona, that he has read the foregoing Answer to the First Amended Complaint of the plaintiff filed in said cause, that he knows the contents of said answer, and that the same is true of his own knowledge, save and except as to those matters alleged upon information and belief, and as to those matters that he believes it to be true.

E. L. VAIL.
P. S. HUGHES.
C. F. RICHARDSON.

Subscribed and sworn to before me this 20th day of May, A. D., 1905.

My Commission Expires January 24th, 1907.

JOHN METS,
Notary Public.

[SEAL.]

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff, *vs.* E. L. Vail, Phil S. Hughes, and C. F. Richardson, as Supervisors of Pima County, Arizona, Defendants. Demurrer, plea and answer to first amended complaint. Filed May 24, 1905. S. M. Cullom, Clerk.

29 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,

vs.

E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

2d Amended Complaint.

Comes now the Territory of Arizona, by E. S. Clark, its Attorney General, and files this, its amended complaint herein, and alleges:

I.

That said defendants are now, and that they and their predecessors in office have been, at all the times herein mentioned, the duly qualified and acting supervisors of the County of Pima, in the Territory of Arizona.

II.

That heretofore, to-wit: on and prior to March 18th, 1903, the said County of Pima was lawfully indebted to various and divers persons on one hundred and fifty certain bonds, known and designated as Arizona Narrow Gauge Subsidy bonds of the denomination of one thousand dollars each, bearing interest at the rate of seven per cent. per annum, payable on the first day of January and July of each year, according to the interest coupons attached thereto, is-
30 sued by said County of Pima on July 1st, 1883, under an act of the legislative assembly of Arizona, entitled "An Act to promote the construction of a certain railroad," approved February 21st, 1883, whereby, for value received the said County of Pima promised to pay to the Arizona Narrow Gauge Railroad Company, or bearer, on the 1st day of July, 1903, the principal sum of said bonds, with interest, at the office of the County treasurer of said Pima County, which said bonds were, on March 13th, 1903, in the hands of innocent purchasers thereof for value, and were legal, valid and subsisting obligations against the County of Pima; said bonds amounting on the 13th day of March, 1903, principal and interest, according to the terms of said bonds, to the sum of three hundred, nineteen thousand seven hundred and ninety-one and twenty-three one-hundredths ($319,791.23) dollars, no part of which sum had been paid though demand for the payment thereof had been made. A true copy of one of said bonds, designated as "No. 1," to distinguish it from the other 149, which were of like character, tenor and effect, except as to the numbering thereof, being hereto attached, marked Exhibit "A" and made a part hereof.

III.

That on the 13th day of March, 1903, the Loan Commission of the Territory of Arizona, upon the request of the owners of the railroad subsidy bonds aforesaid, and in manner and form as provided by law, duly and legally funded said railroad subsidy bonds
31 of the said County of Pima by exchanging therefor 318 territorial funding bonds of the Territory of Arizona of the denomination of one thousand ($1000) dollars each, and one bond or obligation for the sum of two hundred and seventy-five and 29/100 ($275.29) dollars, each bearing interest at the rate of three per cent. per annum, said interest payable semi-annually, to-wit: On the fifteenth day of January and July in each year after the issuance of said bonds until paid, for the payment of which bonds and interest the faith and credit of the Territory of Arizona are pledged. That the said loan commission also necessarily expended in funding said railroad subsidy bonds as aforesaid, for printing said territorial funding bonds, the sum of four hundred and forty-six dollars.

IV.

That the said Arizona Narrow Gauge Subsidy bonds, so issued by Pima County and funded as aforesaid, were the same bonds, and of the same series and issue of bonds and coupons that were the subject of litigation, as to their validity, in the several actions entitled Charles Edward Lewis *vs.* Pima County, and Utter *vs.* Franklin, and Utter *vs.* Murphy, respectively, heretofore tried and determined in this Court and in the Supreme Court of the United States.

V.

That the said Loan Commission of Arizona thereby and in manner and form as aforesaid, funded 150 of said railroad subsidy bonds of said Pima County, of the denomination of one thousand
32 ($1000) dollars each, together with the accrued interest thereon as evidenced by the coupons attached thereto, all amounting to the sum of three hundred nineteen thousand, seven hundred and ninety-one and 23/100 ($319,791.23) dollars.

VI.

That by reason of the funding of said bonds, as aforesaid, and the issuance of 319 territorial funding bonds of said Territory of Arizona, there became due and payable as interest thereon according to the tenor thereof, on the 15th day of January, 1904, the sum of nine thousand, five hundred and forty-eight and 26/100 ($9,548.26) dollars, and on the 15th day of January and July in each year subsequent thereto, there became due and payable to the holders of said territorial funding bonds, as interest thereon, according to the terms and conditions thereof, the sum of four thousand, seven hundred

and seventy-four and 13/100 ($4,774.13) dollars, all payable at the office of the territorial treasurer of the Territory of Arizona."

VII.

That pursuant to the statutes in such cases made and provided, and in compliance with the terms and conditions of said funding bonds so issued as aforesaid, the treasurer of the Territory of Arizona has duly paid all of the interest due on said bonds at the times when said interest has become due and payable, according to said terms and conditions, said interest so paid amounting in all at the present time to the sum of $19,096.51, and has taken up and canceled
33 the interest coupons attached to said bonds to that extent and for that amount, and has also paid the sum of $446.00 for printing said funding bonds.

VIII.

That upon the issuance of said territorial funding bonds, as aforesaid, it became, and was, and is the duty of the Board of Supervisors of the County of Pima to levy annually upon the taxable property in said county a sufficient tax, in addition to all other taxes, to pay the interest on said bonds so issued by the Territory, as aforesaid.

IX.

That for the year 1903, the territorial board of equalization of Arizona, at its regular annual session for that year, fixed the rate of taxes for territorial purposes to be levied and collected in each county in said territory, and duly levied, as plaintiff is informed and verily believes, as a part of said territorial tax, the sum of fifty-two cents on each one hundred dollars' valuation of the taxable property in said County of Pima, for the purpose of paying the interest on the funded indebtedness of the said County of Pima, including interest on the funding bonds heretofore mentioned, accruing during the year 1903, and until January 15th, 1904, and the territorial auditor of the said territory duly certified the levy of said tax aforesaid to the County Board of Supervisors of said County of Pima, for the purpose of having the said Board of Supervisors levy said tax and include it in the tax roll for that year; that thereupon the said Super-
34 visors of said County of Pima unlawfully and wrongfully refused and neglected to levy said tax of fifty-two cents on each one hundred dollars' valuation of the taxable property in said County, but levied the sum of only thirty cents on each one hundred dollars' valuation of said County, which levy was sufficient to raise the amount of money required to pay the interest on all the funded indebtedness of said County of Pima other than the territorial funding bonds issued in lieu of said Arizona Narrow Gauge subsidy bonds as aforesaid, but was wholly inadequate and insufficient to pay the interest on the funding bonds hereinbefore described, or any part thereof.

X.

That for the year 1904, the territorial board of equalization at its regular annual session, duly levied fifty-four cents on each one hundred dollars of valuation of the taxable property in said County of Pima for the purpose of paying the interest on the funded indebtedness of said County of Pima, including the interest on the funding bonds aforesaid, accruing during the year 1904 and until January 15th, 1905, and the territorial auditor of the said Territory of Arizona duly certified the levy of said tax to the county board of supervisors of said County of Pima; that thereupon the said supervisors of Pima County unlawfully and wrongfully refused and still refuse to levy said tax of fifty-four cents on each one hundred dollars of valuation on the taxable property of said County of Pima, but only levied a sum sufficient to pay the interest on all the
35 funded indebtedness of said County other than the territorial funding bonds issued in lieu of said Arizona Narrow Gauge subsidy bonds as aforesaid, which said levy was wholly insufficient to pay the interest on said territorial funding bonds for said year or any part thereof; and said board of supervisors then and there further refused to make the levy for the year 1903, as hereinbefore described, to pay the interest for that year on the territorial funding bonds aforesaid; and, as plaintiff is informed and verily believes, said supervisors will not levy the taxes aforesaid to pay the said interest unless compelled to do so by the mandate of this court; that said defendants assert and claim that they do not intend to and will not levy said taxes for the purpose of paying the interest on the funding bonds aforesaid.

XI.

Plaintiff further alleges that it became and was the plain duty of said board of supervisors to levy the said tax of fifty-two cents on each one hundred dollars of valuation for the year 1903, for the purpose of paying the interest on said territorial funding bonds, and also to levy said tax of fifty-four cents on each one hundred dollars of valuation upon the taxable property in said County of Pima to pay said interest for the year 1904; and that said board of supervisors should, during the year 1905, and each year thereafter during the term of said funding bonds, levy such tax as may be fixed by the territorial board of equalization for the purpose of paying the
36 interest on said funding bonds, and the expense of printing the same.

XII.

Plaintiff further alleges that it has no plain, speedy and adequate remedy at law; that it is the party beneficially interested in the payment of the interest aforesaid, and the expense of printing said funding bonds, to the Territory of Arizona; that neither the said County of Pima, nor any one in its behalf, has ever paid to the Territory of Arizona, or any one in its behalf, the sum of money paid

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out by the territorial treasurer of Arizona, as set forth in paragraph VI of this complaint, or any part thereof, and that the same is wholly due and payable by said County of Pima to the said Territory of Arizona.

XIII.

That prior to the institution of this action, demand was made by the Territorial Auditor, representing the Territory of Arizona, of the Board of Supervisors of Pima County to levy the tax assessments as set forth herein, and said Board of Supervisors failed, neglected and refused to make said levy.

Wherefore, plaintiff prays that a writ of mandate issue out of this honorable court, directed to the said defendants and each of them, commanding them in due season to convene as a Board of Supervisors and to levy and assess upon the taxable property of the said County of Pima the sum of twenty-two cents, or such other sum as may be adequate and necessary, on each one hundred dollars
37 of valuation therein, for the purpose of paying the interest on the said funding bonds for the year 1903, and also to levy and assess upon said taxable property in the County of Pima such further sum as may be adequate and necessary on each one hundred dollars of valuation therein, for the purpose of paying the interest on the said funding bonds for the year 1904, and also to levy and assess upon the taxable property in the County of Pima for the year 1905, and each year thereafter during the life of said funding bonds, such tax as may be fixed by the territorial board of equalization from year to year for the purpose of paying the interest on said funding bonds, and the cost of printing the same.

For costs of suit, and for such other and further relief as to the court may seem just and proper in the premises.

THE TERRITORY OF ARIZONA,
By E. S. CLARK, *Its Attorney General.*

TERRITORY OF ARIZONA, *County of Yavapai, ss:*

E. S. Clark, first having been duly sworn, upon his oath says: That he is the Attorney General of the Territory of Arizona; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, save and except as to those matters therein alleged upon information and belief,
38 and as to those matters that he believes it to be true.

E. S. CLARK.

Subscribed and sworn to before me this 1st day of June, A. D., 1905.

My commission expires Sept. 11, 1905.

[SEAL.]

EMMA CHURCH,
Notary Public.

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EXHIBIT "A."

UNITED STATES OF AMERICA,

Territory of Arizona, County of Pima.

One Thousand Dollars. One Thousand Dollars.

The County of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Railroad Company, or bearer, at the office of the Treasurer of said County in the city of Tucson, on the first day of July, A. D. one thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of Pima County, semi-annually, on the first day of January and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the Board of Supervisors of said County of Pima, under and by virtue of an Act of the Legislature of
39 Arizona entitled "An Act to Promote the construction of a certain Railroad," passed by the Legislative Assembly of the Territory of Arizona, and approved by the Governor thereof the 21st day of February A. D., 1883, and this bond is one of a series of Two Hundred issued in pursuance of said Act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the Bonds of which this is one.

In testimony whereof the said County by its Board of Supervisors has caused this bond and the coupons hereto attached, to be signed by the Chairman of the Board of Supervisors and countersigned by the Clerk of said Board, and by the County Recorder of the said County of Pima, and the said Clerk has affixed hereto the seal of said County, and the said Recorder has affixed hereto the seal of said County Recorder's office this first day of July, A. D., 1883.

JAMES H. TOOLE,
Chairman, Board Supervisors.
CHAS. R. DRAKE,
County Recorder. [SEAL.]

WILLIAM J. OSBORNE,
Clerk, Board of Supervisors. [SEAL.]

Bond No. 82.

Pima County Bond.

Coupon Number 40.

On the first day of July, A. D., 1903, the County of Pima, in the Territory of Arizona will pay to the bearer at the County Treasurer's

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office at Tucson, Thirty-five Dollars ($35.) being interest due on bond No. 82.

JAMES H. TOOLE,
Chairman, Board of Supervisors of Pima County.

40 CHAS. R. DRAKE,
Recorder of Pima Co.

WILLIAM J. OSBORNE,
Clerk, Board of Supervisors of Pima County.

(And here follows attached to said bond 39 coupons numbered consecutively from 1 to 39, of like tenor and effect as above coupon, except as to date of payment and number of coupon.)

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. Territory of Arizona *vs.* E. L. Vail, *et al.* 2nd amended complaint. Filed June 2, 1905. S. M. Cullom, Clerk.

41 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Come now the defendants in the above entitled cause and demur to the Second Amended Complaint of the plaintiff heretofore filed herein, and for cause of demurrer alleges:

That said Complaint does not state facts sufficient to constitute a cause of action.

Wherefore, defendants pray that they be hence dismissed with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

42 And answering said Second Amended Complaint of Plaintiff heretofore filed herein, and in bar of plaintiff's right to sue, defendants allege that on the 29th day of October, 1894, at Washington, D. C., in an action then pending on appeal in the Supreme Court of the United States, between Charles Edward Lewis, as plaintiff and appellant, and Pima County, defendant and appellee, and concerning the validity of the Arizona Narrow Gauge Subsidy Bonds, which are the identical bonds alleged to have been funded by the Loan Commission of the Territory of Arizona, in the First Amended Complaint in this action filed, and on account of the funding of which this action is maintained, judgment was duly given and made by said Court to the effect that the Legislature of Arizona, under and by virtue of an Act of the Legislative Assembly of the Territory of Arizona, entitled: "An Act to promote the construction

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of a certain railroad," approved February 21st, 1883, exceeded its powers in authorizing and requiring Pima County to issue its bonds in exchange for those of railroad company in question, and that the bonds were, and are, void.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

43 And further answering said Second Amended Complaint of plaintiff heretofore filed herein, the defendants deny that on, and prior to March 13th, 1903, or at any other time, the said County of Pima was lawfully, or at all, indebted to various and diverse persons, or to any person, or persons, on one hundred and fifty (150) certain bonds knows as the Arizona Narrow Gauge Subsidy Bonds, or upon any railway subsidy bonds whatsoever, of the denomination of $1000 each, or in any other denomination whatsoever. Defendants deny that any Arizona Narrow Gauge Subsidy Bonds alleged to have been issued by Pima County, or that any railway subsidy bonds of whatever character alleged to have been issued by said County, were, or are, in the hands of innocent purchasers thereof for value, or were or are, in the hands of any purchaser, or purchasers, whomsoever, for value, or otherwise. Defendants deny that any Arizona Narrow Gauge Subsidy Bonds alleged to have been issued by said County, or that any other railway subsidy bonds of whatever character alleged to have been issued by Pima County, are now, or ever were, legally valid or subsisting obligations against said County. Defendants deny that the amount of principal and interest due by said County of Pima upon the Arizona Narrow Gauge Subsidy Bonds, or upon any other subsidy railroad bonds alleged to have been issued by said Pima County, was on the 13th day of March, 1903, according to the terms of such alleged bonds, the sum of Three Hundred, Nineteen Thousand Seven Hundred and Ninety-
44 one and 23/100 ($319,791.23) Dollars, or any other sum of money whatsoever, on said date, or at any other time prior or subsequent thereto. Defendants deny generally and specifically each and every the allegations contained in Paragraph II of plaintiff's said Complaint, save that defendants admit that said County of Pima, prior to December 31st, 1890, issued certain bonds, known and designated as Arizona Narrow Gauge Subsidy Bonds, under and by virtue of the act of the Legislative Assembly of Arizona, entitled, "An Act to promote the construction of a certain railroad," approved February 21st, 1883, and save that defendants admit that a true copy of one of said bonds, is attached to plaintiff's said complaint, and that the other 149 bonds were of like tenor, and as to these admitted allegations, the defendants allege that the said Act of the Legislative Assembly of Arizona, was, and is, a void act, and that the bonds so issued by Pima County, under and by virtue of said Act were, and

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at all times have been, void, and without any force or effect whatsoever.

Wherefore, defendants pray that they be hence dismissed with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

And further answering said Second Amended Complaint of plaintiff heretofore filed herein, the defendants allege:

45

I.

That in 1882, the Arizona Narrow Gauge Railroad Company was incorporated under Act No. 49 of the Session Laws of Arizona, of 1879; That its alleged purpose was to construct a narrow gauge railroad from the City of Tucson, in Pima County, Arizona, in a northeasterly direction to the town of Globe, in Gila County, Arizona.

II.

That in the month of July, 1883, acting under the provisions of Act No. 35 of the Session Laws of Arizona of 1883, entitled "An Act to promote the construction of a certain railroad," approved February 21st, 1883, the said railroad company presented $50,000 of its bonds to the Supervisors of Pima County, and thereupon the said Supervisors delivered to said railroad company therefor $50,000 of Pima County bonds, said bonds being a part of the subsidy bonds funded as set out in plaintiff's Complaint herein:—That at the time of the issuance of said bonds by Pima County to the said railroad company, the said railroad company owned no property, real or personal, and had done nothing except to incorporate, issue its bonds and execute a trust deed.

III.

That neither the officers, nor the people of Pima County, petitioned for the passage of said Act No. 35, nor did they subsequent to the passage of said act approve or consent to the same.

46

IV.

That thereafter the officers of said railroad company delivered to the said Board of Supervisors an additional $100,000 of said railroad bonds, and received in exchange therefor $100,000 of Pima County bonds, in compliance with the terms of the said Act No. 35 of the Legislative Assembly of Arizona of 1883.

V.

That said railroad company graded a right of way and laid ties and rails for ten miles in a northerly direction from Tucson Arizona,

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and discontinued its work: That no train, save one engine and a few dirt cars, were ever run upon the said railroad: That said railroad was built across a tenantless desert, and that the same in a few years fell into complete ruin and decay: That the rails were sold for old iron and nothing was left but a slight elevation in the desert to show where the proposed right of way had been: That no action was ever taken by the railroad company under the Acts of Congress to secure a right of way.

VI.

That Pima County never recognized the validity of the bonds so issued as aforesaid, and did not pay interest thereon, nor did Pima County recognize the funding bonds issued by the Territory in lieu of said narrow gauge bonds, as set forth in plaintiff's Complaint, nor has it paid any interest on such funding bonds.

VII.

47 That after the issuance of the bonds aforesaid to the railroad company in manner and form as aforesaid, one Charles Edward Lewis, the holder of such bonds, instituted a suit in the District Court of Pima County, Territory of Arizona, to enforce the payment of 2250 coupons attached to certain of said bonds: That said case was taken to the Supreme Court of the United States, and decided October 29th, 1894, and that in said cause the said bonds were declared void.

VIII.

That many of the bonds issued by counties other than Pima in the Territory of Arizona, were effected by this decision: That some of these bonds had been issued to aid legitimate improvements: That their validity had been recognized by the counties and interest paid thereon: That because of this, the Legislature of Arizona memorialized Congress to validate bonds issued under legislative authority, the validity of which bonds had been acknowledged by the payment of interest: That thereafter the Congress of the United States, 1896, Volume 29, Statutes at Large, page 262, passed an act complying with the request of the memorialists.

IX.

That under and by virtue of the authority of said Act of Congress, and also under and by virtue of the authority of Act No. 79 of the Legislative Assembly of Arizona of 1891, permitting any holder of bonds to surrender them to the Loan Commission for fund-
48 ing, the holders of the identical Pima County bonds which had been declared void by the Supreme Court of the United States in 1894 as aforesaid, offered to deliver these bonds to the Territorial Loan Commission for funding: And did so deliver the same

and did demand their funding: That in March, 1903, the said Loan Commissioners of Arizona, did fund said bonds.

X.

That the Act of Congress of 1896 hereinabove referred to, did not and could not legalize the said bonds; that said bonds were and are void; that the action of the Loan Commission in funding the same was and is a void act, and that the action of said Loan Commission in funding the same, was and is not binding upon Pima County.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendant.
KINGAN & WRIGHT,
Of Counsel for Defendants.

TERRITORY OF ARIZONA, *County of Pima, ss:*

E. L. Vail, Phil S. Hughes, and C. F. Richardson, having been by me first duly sworn, on their separate oaths, each for himself and not one for the other, says: That he is one of the defendants in the above entitled cause; that he is one of the duly elected,
49 qualified and acting Supervisors of Pima County, Territory of Arizona; that he has read the foregoing Answer to the Second Amended Complaint of the plaintiff filed in said cause; that he knows the contents of said Answer, and that the same is true of his own knowledge, save and except as to those matters alleged upon information and belief, and as to those matters that he believes it to be true.

E. L. VAIL.
P. S. HUGHES.
C. F. RICHARDSON.

Subscribed and sworn to before me this 21 day of June, A. D. 1905.

My Commission expires January 24th, 1907.

[SEAL.]

JOHN METS,
Notary Public.

(Endorsed:) No. 903. In the Supreme Court, Territory of Arizona. Territory of Arizona, Plaintiff *vs.* E. L. Vail, Phil S. Hughes, and C. F. Richardson, as Supervisors of Pima County, Arizona, Defendants. Demurrer, plea and answer to second amended complaint. Filed June 22, 1905, S. M. Cullom, Clerk.

50 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., as Supervisors of Pima County, Arizona, Defendants.

Comes now the plaintiff by E. S. Clark, Attorney General, and moves the Court for judgment, upon the pleadings herein, in accordance with the prayer of plaintiff's complaint.

E. S. CLARK,
Attorney General.

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. Territory of Arizona *vs.* E. L. Vail, *et al.* Motion for judgment. Filed Jan'y 19, 1906. S. M. Cullom, Clerk.

51 In the Supreme Court of the Territory of Arizona.

No. 903.

TERRITORY OF ARIZONA, Petitioner,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Respondents.

This is an original application for a writ of mandamus to compel the respondents to make certain levies and assessments upon the taxable property in Pima county for the purpose of paying the interest on certain territorial funding bonds issued in exchange for certain bonds of the county of Pima, known and designated as Arizona Narrow Gauge Subsidy bonds. The respondents having filed a plea in bar and an answer to the petition, the matter is before the court upon the application of the petitioner for judgment on the pleadings.

Mr. E. S. Clark, Attorney-General, for petitioner.

Messrs. Benton Dick and Kingan & Wright, for respondents.

Opinion per Curiam.

As the matter comes before us, there are no disputed questions of fact to be determined. The facts are, that in 1883 the legislature of this territory passed an act making it the duty of the board of supervisors of Pima county to issue $200,000 of county bonds,
52 and to deliver the same to the Arizona Narrow Gauge Railroad Company. $150,000 of these bonds were issued by the county, delivered to the company and sold by it. In 1894 the Supreme Court of the United States, in the case of Lewis *v.* Pima County, 155 U. S. 54, held these bonds void, by reason of the fact that the act of the legislature was in excess of its powers as limited

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by acts of Congress. In that case Pima county presented, not only the contention thus upheld by the court, but also the contention that these bonds were void for the additional reason that they were issued by the county under an act of the legislature directing, commanding and compelling the issue thereof, irrespective of the will or interests of the county. The Supreme Court of the United States did not express an opinion on the latter point, because, as stated by them, it was not necessary to the determination reached. In 1896 Congress passed an act affirming, approving, and validating "all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature" of Arizona Territory, "as hereinbefore authorized to be funded." In suits to which Pima county was not a party, the Supreme Court of the United States held that this act applied to the bonds in question, and cured the defect under which they were held to be void in Lewis *v.* Pima county, *supra.*

Utter *v.* Franklin, 172 U. S. 416;
Murphy *v.* Utter, 186 U. S. 95.

The respondents maintain that the bonds in question are void by reason of the fact that the act of the legislature *commanded*
53 the county to issue the bonds, and hence the writ should not issue; and that, as this question has not been determined by the Supreme Court of the United States, this court may properly pass upon it. Even if it be that the question is an open one, and the validity of these bonds has not been conclusively determined by the Supreme Court of the United States, still we think the contention of the respondents is not well taken. It is conceded that Congress could validate these bonds by subsequent legislation, if it had the power to pass the act in question in the first instance; but it is contended that Congress could not have compelled the county to issue the bonds, and therefore can not give life to bonds issued under compulsion of such an act as that passed by the territorial legislature.

Without deciding the point, if it be conceded that neither under such an act of the legislature, nor under a like act passed by Congress could the county have been compelled to issue or deliver these bonds, and that its officers could with impunity have successfully defeated the act by refusing compliance therewith, the fact is, nevertheless, that the county did avail itself of the act, and issued and delivered the bonds. In the absence of legislative authority, a municipality may not issue such bonds; it may issue them if so authorized. Assuming that the act of the legislature became in effect the act of Congress by virtue of the retroactive effect of the remedial act of Congress, it can not successfully be maintained that the county acted without legislative authority, because in its language the act was mandatory, and not merely permissive. So far as the act
54 commanded the issuance of the bonds, it might not have been enforceable, had the county chosen to disregard it, but in this case the county did issue the bonds, and thus complied with the requirement; and we think the act of the legislature constituted adequate permissive legislation to support the action of the county in issuing the bonds.

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Upon all the other points raised by counsel, by virtue of the decisions of the Supreme Court of the United States, the rule of *stare decisis* must apply.

Let the writ issue as prayed for.

EDWARD KENT, *C. J.*
RICHARD E. SLOAN, *A. J.*
FLETCHER M. DOAN, *A. J.*
JOHN H. CAMPBELL, *A. J.*
FREDERICK S. NAVE, *A. J.*

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. Territory of Arizona, Petitioner, *vs.* E. L. Vail, *et al.*, Respondents. Opinion, per Curiam. Filed Mar. 30, 1906. S. M. Cullom, Clerk.

55 In the Supreme Court of the Territory of Arizona, January Term, 1906.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Motion for Rehearing.

The said defendants come now and respectfully petition this Honorable Court for a re-hearing of said cause, for the following reasons, to-wit:—

1. Because the Court erred in granting the motion for the plaintiff for judgment upon the pleadings.

2. Because the Court erred in holding that the Act of Congress of June 6th, 1896, Vol. 29, Statutes at Large, 262, could validate the Pima County Narrow Gauge Bonds, issued in compliance with Act No. 35, Legislature of Arizona of 1883.

3. Because the Court erred in holding that the said Act of June 6th, 1896, is a valid act in so far as it relates to the validation of said bonds under said Act No. 35, Session Laws of Arizona of 1883, for that said Act is in contravention of the Constitution of the United States.

4. Because Congress had no power to validate bonds issued
56 under Act No. 35, Laws 1883, and the Court erred in holding that said Act of June 6th, 1896, did or could validate said bonds.

5. Because the Court erred in holding that the Act of Congress of June 6th, 1896, attempted to or did validate the said Pima County Narrow Gauge Bonds, issued in compliance with Act No. 35, Laws of the Territory of Arizona of 1883.

6. Because the Court erred in holding that the decisions of the Supreme Court of the United States in the cases of Utter *vs.* Franklin and Murphy *vs.* Utter were *res adjudicata* or *stare decisis* upon these defendants in this action.

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Wherefore, your petitioners pray that an order be made for a rehearing in this cause on a day to be appointed by this Court at the present term upon the above points and such other points as the Court may direct.

BENTON DICK,
District Attorney of Pima Co.
KINGAN & WRIGHT,
Attorneys for Defendants.

(Endorsed:) No. 903. Territory of Arizona *v.* E. L. Vail *et al.* Motion for Rehearing. Filed March 30/06. S. M. Cullom, Clerk. By Angie B. Parker, Deputy. Service admitted March 30, 1906. E. S. Clark, Attorney General.

57 In the Supreme Court of the Territory of Arizona, January Term, 1906.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Petition for Appeal.

The above named defendants, conceiving themselves aggrieved by the judgment made and entered on the 30th day of March, 1906, and denial of rehearing entered May 12th, 1906, in the above entitled cause, do hereby appeal from said judgment to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith, and pray that this appeal may be allowed, that citation may issue, and that the transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated may be sent to the Supreme Court of the United States.

Dated this 12th day of May, 1906.

KINGAN & WRIGHT,
Attorneys for Defendants.

The foregoing appeal is allowed and bond fixed at the sum of One Thousand Dollars.

58 Dated 12th day of May, 1906.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff, *vs.* E. L. Vail, Phil S. Hughes, and C. F. Richardson, as Supervisors of Pima County, Arizona, Defendants. Petition for Appeal. Filed May 12, 1906, S. M. Cullom, Clerk.

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59 In the Supreme Court of the Territory of Arizona, January Term, 1906.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Assignment of Errors.

The defendants pray an appeal from the final decree and judgment of this Court to the Supreme Court of the United States and assign for error:

1. Because the Court erred in granting the motion of the plaintiff for judgment upon the pleadings.

2. Because the Court erred in holding that the Act of Congress of June 6th, 1896, Vol. 29, Statutes at Large, 262, could validate the Pima County Narrow Gauge Bonds, issued in compliance with Act No. 35, Legislature of Arizona of 1883.

3. Because the Court erred in holding that the said Act of June 6th, 1896, is a valid act in so far as it relates to the validation of said bonds under said Act No. 35, Session Laws of Arizona of 1883, for that said Act is in contravention of the Constitution of the United States.

60 4. Because Congress had no power to validate bonds issued under Act No. 35, Laws 1883, and the Court erred in holding that said Act of June 6th, 1896, did or could validate said bonds.

5. Because the Court erred in holding that the Act of Congress of June 6th, 1896, attempted to or did validate the said Pima County Narrow Gauge Bonds, issued in compliance with Act No. 35, Laws of the Territory of Arizona, of 1883.

6. Because the Court erred in holding that the decisions of the Supreme Court of the United States in the cases of Utter *vs.* Franklin and Murphy *vs.* Utter were *res adjudicata* or *stare decisis* upon these defendants in this action.

And defendants pray for an order that the decree and judgment of this Honorable Court in this cause may be suspended pending the appeal.

KINGAN & WRIGHT,
Attorneys for Defendants.

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff, *vs.* E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona, Defendants. Assignment of Errors. Filed May 12, 1906. S. M. Cullom, Clerk.

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61 In the Supreme Court of the Territory of Arizona, January Term, 1906.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Affidavit of Amount of Controversy.

TERRITORY OF ARIZONA, *County of Maricopa, ss:*

John B. Wright, being first duly sworn, on his oath, says: That he is a member of the firm of Kingan & Wright, Attorneys for the defendant in the above entitled cause; that as such Attorney he is familiar with the matters and things in issue in said cause, and that the amount in controversy in said above named cause exceeds the sum of Five Thousand Dollars, exclusive of interest and costs.

JOHN B. WRIGHT.

Subscribed and sworn to before me this 12 day of May, A. D. 1906.
[SEAL.]
S. M. CULLOM,
Clerk Supreme Court of Arizona.

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff, *vs.* E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona, Defendants. Affidavit of amount of controversy. Filed May 12, 1906. S. M. Cullom, Clerk.

62 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Cost Bond on Appeal.

Know all men by these presents: That we, E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona, as principals, and Albert Steinfeld and H. B. Tenney, as sureties, are held and firmly bound unto the Territory of Arizona in the full and just sum of One Thousand Dollars ($1,000.00), to be paid to the said Territory of Arizona: To which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of May, A. D. *in the year of our Lord* one thousand nine hundred and six.

Whereas, lately at a Supreme Court for the Territory of Arizona, holden on the 30th day of March, 1906, in a suit depending in said Court between the Territory of Arizona, plaintiff and E. L. Vail,

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Phil S. Hughes and C. F. Richardson as Supervisors of Pima County, Arizona, defendants, a judgment was rendered against the said E. L. Vail, Phil S. Hughes and C. F. Richardson, as
63 such Supervisors, and the said E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors, having obtained an appeal, and filed a copy thereof in the Clerk's office of the said Court, to reverse the decree and judgment in the aforesaid suit, and the citation directed to the said Territory of Arizona, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 22nd day of June next:

Now the condition of the above obligation is such that, if the said E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors as aforesaid, shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

E. L. VAIL,
PHIL S. HUGHES,
C. F. RICHARDSON,
As Supervisors of Pima County, Arizona.
ALBERT STEINFELD.
H. B. TENNEY.

Sealed and delivered in the presence of:
JOHN B. WRIGHT.
JOHN METS.

TERRITORY OF ARIZONA, *County of Pima, ss:*

Albert Steinfeld and H. B. Tenney, the sureties on the above entitled bond, being first duly sworn on their oaths, each for
64 himself and not one for the other, doth say: That he is worth the sum of One Thousand Dollars, being the amount for which he has become surety on the above bond in property exempt from execution and that is subject to forced sale, and that he is a householder or freeholder in said Territory.

ALBERT STEINFELD.
H. B. TENNEY.

Subscribed and sworn to before me this 21st day of May, A. D. 1906.

My Commission Expires January 24th, 1907.

[SEAL.] JOHN METS,
Notary Public.

Approved:
EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff, *vs.* E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona, Defendants. Cost Bond on Appeal. Filed May 26, 1906. S. M. Cullom, Clerk.

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65 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Supersedeas Bond on Appeal.

Know all men by these presents: That we, E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona, as principals, and Albert Steinfeld and H. B. Tenney, as sureties, are held and firmly bound unto the Territory of Arizona in the full and just sum of Five Thousand Dollars ($5,000.00), to be paid to the said Territory of Arizona: To which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of May, A. D. *in the year of our Lord* one thousand nine hundred and six.

Whereas, lately at a Supreme Court for the Territory of Arizona, holden on the 30th day of March, 1906, in a suit depending in said Court between the Territory of Arizona, plaintiff, and E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima
66 County, Arizona, defendants, a judgment was rendered against the said E. L. Vail, Phil S. Hughes and C. F. Richardson, as such Supervisors, and the said E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors, having obtained an appeal, and filed a copy thereof in the Clerk's office of the said Court, to reverse the decree and judgment in the aforesaid suit, and the citation directed to the said Territory of Arizona, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, on the 22nd day of June next:

Now the condition of the above obligation is such that, if the said E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors as aforesaid, shall prosecute their appeal to effect, and shall carry out the orders and mandates of the Court, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void; else to remain in full force and effect.

E. L. VAIL,
PHIL S. HUGHES,
C. F. RICHARDSON,
As Supervisors of Pima County, Arizona.
ALBERT STEINFELD.
H. B. TENNEY.

Sealed and delivered in the presence of:
JOHN B. WRIGHT.
JOHN METS.

TERRITORY OF ARIZONA, *County of Pima, ss:*

67 Albert Steinfeld and H. B. Tenney, the sureties on the above entitled bond, being first duly sworn on their oaths, each for himself and not one for the other, doth say: That he is worth the sum of Five Thousand Dollars, being the amount for which he has become surety on the above bond in property exempt from execution and that is subject to forced sale, and that he is a householder or freeholder in said Territory.

ALBERT STEINFELD.
H. B. TENNEY.

Subscribed and sworn to before me this 21st day of May, A. D. 1906.

My Commission expires January 24th, 1907.

[SEAL.] JOHN METS,
Notary Public.

Approved:
EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff *vs.* E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona, Defendants. Supersedeas Bond. Filed May 26, 1906. S. M. Cullom, Clerk.

68 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

I, Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, do hereby certify: That the above entitled case was tried in the said Court upon the Amended Complaint, the Amended Answer, and the Motion of Plaintiff for Judgment on the Pleadings, and no other pleadings: that there was no evidence introduced upon the trial of said cause, and that said cause was tried upon the aforesaid pleadings only; that by reason thereof, the said pleadings are a full and complete Statement of the Case, and that true, full and correct copies of said pleadings, and all thereof, are hereto appended as and for a Statement of the Case.

In witness whereof, I have hereto set my hand on this the 23rd day of May, A. D. 1906.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

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69 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

2d Amended Complaint.

Comes now the Territory of Arizona, by E. S. Clark, its Attorney General, and files this, its amended complaint herein, and alleges:

I.

That said defendants are now, and that they and their predecessors in office have been, at all the times herein mentioned, the duly qualified and acting supervisors of the County of Pima, in the Territory of Arizona.

II.

That heretofore, to-wit: on and prior to March 13th, 1903, the said County of Pima was lawfully indebted to various and divers persons on one hundred and fifty certain bonds, known and designated as Arizona Narrow Gauge Subsidy bonds of the denomination of one thousand dollars each, bearing interest at the rate of seven per cent. per annum, payable on the first day of January and July of
70 each year, according to the interest coupons attached thereto, issued by said County of Pima on July 1st, 1883, under an act of the legislative assembly of Arizona, entitled "An Act to promote the construtions of a certain railroad," approved February 21st, 1883, whereby, for value received the said County of Pima promised to pay to the Arizona Narrow Gauge Railroad Company, or bearer, on the 1st day of July, 1903, the principal sum of said bonds, with interest, at the office of the County treasurer of said Pima County, which said bonds were, on March 13th, 1903, in the hands of innocent purchasers thereof for value, and were legal, valid and subsisting obligations against the County of Pima: said bonds amounting on the 13th day of March, 1903, principal and interest, according to the terms of said bonds, to the sum of three hundred, nineteen thousand, seven hundred and ninety-one and twenty-three one-hundredths ($319,791.23) dollars, no part of which sum had been paid though demand for the payment thereof had been made. A true copy of one of said bonds, designated as "No. 1" to distinguish it from the other 149, which were of like character, tenor and effect, except as to the numbering thereof, being hereto attached, marked Exhibit "A" and made a part hereof.

III.

That on the 13th day of March, 1903, the Loan Commission of the Territory of Arizona, upon the request of the owners of the rail-

road subsidy bonds aforesaid, and in manner and form as pro-
71 vided by law, duly and legally funded said railroad subsidy bonds of the said County of Pima by exchanging therefor 318 territorial funding bonds of the Territory of Arizona of the denomination of one thousand ($1000) dollars each, and one bond or obligation for the sum of two hundred and seventy-five and 29/100 ($275.29) dollars, each bearing interest at the rate of three per cent. per annum, said interest payable semi-annually, to-wit: On the fifteenth day of January and July in each year after the issuance of said bonds until paid, for the payment of which bonds and interest the faith and credit of the Territory of Arizona are pledged. That the said loan commission also necessarily expended in funding said railroad subsidy bonds as aforesaid, for printing said territorial funding bonds, the sum of four hundred and forty-six dollars.

IV.

That the said Arizona Narrow Gauge Subsidy Bonds, so issued by Pima County and funded as aforesaid, were the same bonds, and of the same series and issue of bonds and coupons that were the subject of litigation, as to their validity, in the several actions entitled Charles Edward Lewis *vs.* Pima County, and Utter *vs.* Franklin, and Utter *vs.* Murphy, respectively, heretofore tried and determined in this Court and in the Supreme Court of the United States.

V.

That the said Loan Commission of Arizona thereby and in manner
and form as aforesaid, funded 150 of said railroad subsidy
72 bonds of said Pima County, of the denomination of one thousand ($1000) dollars each, together with the accrued interest thereon as evidenced by the coupons attached thereto, all amounting to the sum of three hundred nineteen thousand, seven hundred and ninety-one and 23/100 ($319,791.23) dollars.

VI.

That by reason of the funding of said bonds, as aforesaid, and the issuance of 319 territorial funding bonds of said Territory of Arizona, there became due and payable as interest thereon according to the tenor thereof, on the 15th day of January, 1904, the sum of nine thousand, five hundred and forty-eight and 26/100 ($9,548.26) dollars, and on the 15th day of January and July in each year subsequent thereto, there became due and payable to the holders of said territorial funding bonds, as interest thereon, according to the terms and conditions thereof, the sum of four thousand, seven hundred and seventy-four and 13/100 ($4,774.13) dollars, all payable at the office of the territorial treasurer of the Territory of Arizona.

VII.

That pursuant to the statutes in such cases made and provided, and in compliance with the terms and conditions of said funding bonds

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so issued as aforesaid, the treasurer of the Territory of Arizona has duly paid all of the interest due on said bonds at the times when said interest has become due and payable, according to said terms
73 and conditions, said interest so paid amounting in all at the present time to the sum of $19,096.51, and has taken up and cancelled the interest coupons attached to said bonds to that extent and for that amount, and has also paid the sum of $446.00 for printing said funding bonds.

VIII.

That upon the issuance of said territorial funding bonds, as aforesaid, it became, and was, and is the duty of the Board of Supervisors of the County of Pima to levy annually upon the taxable property in said county, a sufficient tax, in addition to all other taxes, to pay the interest on said bonds so issued by the Territory, as aforesaid.

IX.

That for the year 1903, the territorial board of equalization of Arizona, at its regular annual session for that year, fixed the rate of taxes for territorial purposes to be levied and collected in each county in said territory, and duly levied, as plaintiff is informed and verily believes, as a part of said territorial tax, the sum of fifty-two cents on each one hundred dollars' valuation of the taxable property in said County of Pima, for the purpose of paying the interest on the funded indebtedness of the said County of Pima, including interest on the funding bonds heretofore mentioned, accruing during the year 1903, and until January 15th, 1904, and the territorial auditor of the said territory duly certified the levy of said tax aforesaid to the County Board of Supervisors of said County of Pima, for the purpose of having the said Board of Supervisors levy said
74 tax and include it in the tax roll for that year; that thereupon the said Supervisors of said County of Pima unlawfully and wrongfully refused and neglected to levy said tax of fifty-two cents on each one hundred dollars valuation of the taxable property in said County, but levied the sum of only thirty cents on each one hundred dollars' valuation of said County, which levy was sufficient to raise the amount of money required to pay the interest on all the funded indebtedness of said County of Pima other than the territorial funding bonds issued in lieu of said Arizona Narrow Gauge subsidy bonds as aforesaid, but was wholly inadequate and insufficient to pay the interest on the funding bonds hereinbefore described, or any part thereof.

X.

That for the year 1904, the territorial board of equalization at its regular annual session, duly levied fifty-four cents on each one hundred dollars of valuation of the taxable property in said County of Pima for the purpose of paying the interest on the funded indebtedness of said County of Pima, including the interest on the funding bonds aforesaid, accruing during the year 1904, and until

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January 15th, 1905, and the territorial auditor of the said Territory of Arizona duly certified the levy of said tax to the county board of supervisors of said County of Pima; that thereupon the said supervisors of Pima County unlawfully and wrongfully refused and still refuse to levy said tax of fifty-four cents on each one
75 hundred dollars of valuation on the taxable property of said County of Pima, but only levied a sum sufficient to pay the interest on all the funded indebtedness of said County other than the territorial funding bonds issued in lieu of said Arizona Narrow Gauge subsidy bonds as aforesaid, which said levy was wholly insufficient to pay the interest on said territorial funding bonds for said year or any part thereof; and said board of supervisors then and there further refused to make the levy for the year 1903, as hereinbefore described, to pay the interest for that year on the territorial funding bonds aforesaid; and, as plaintiff is informed and verily believes, said supervisors will not levy the tax aforesaid to pay the said interest unless compelled to do so by the mandate of this court; that said defendants assert and claim that they do not intend to and will not levy said taxes for the purpose of paying the interest on the funding bonds aforesaid.

XI.

Plaintiff further alleges that it became and was the plain duty of said board of supervisors to levy the said tax of fifty-two cents on each one hundred dollars of valuation for the year 1903, for the purpose of paying the interest on said territorial funding bonds, and also to levy said tax of fifty-four cents on each one hundred dollars of valuation upon the taxable property in said County of Pima to pay said interest for the year 1904; and that said board of supervisors should, during the year 1905, and each year thereafter during the term of said funding bonds, levy such tax as may be fixed
76 by the territorial board of equalization for the purpose of paying the interest on said funding bonds, and the expense of printing the same.

XII.

Plaintiff further alleges that it has no plain, speedy and adequate remedy at law; that it is the party beneficially interested in the payment of the interest aforesaid, and the expense of printing said funding bonds, to the Territory of Arizona; that neither the said County of Pima, nor any one in its behalf, has ever paid to the Territory of Arizona, or any one in its behalf, the sum of money paid out by the territorial treasurer of Arizona, as set forth in paragraph VI of this complaint, or any part thereof, and that the same is wholly due and payable by said County of Pima to the said Territory of Arizona.

XIII.

That prior to the institution of this action, demand was made by the Territorial Auditor, representing the Territory of Arizona, of

the Board of Supervisors of Pima County to levy the tax assessments as set forth herein, and said Board of Supervisors failed, neglected and refused to make said levy.

Wherefore, plaintiff prays that a writ of mandate issue out of this honorable court, directed to the said defendants and each of them, commanding them in due season to convene as a Board of Supervisors and to levy and assess upon the taxable property of the said County of Pima the sum of twenty-two cents, or such other sum as may be adequate and necessary, on each one hundred
77 dollars of valuation therein, for the purpose of paying the interest on the said funding bonds for the year 1903, and also to levy and assess upon said taxable property in the County of Pima such further sum as may be adequate and necessary on each one hundred dollars of valuation therein, for the purpose of paying the interest on the said funding bonds for the year 1904, and also to levy and assess upon the taxable property in the County of Pima for the year 1905, and each year thereafter during the life of said funding bonds, such tax as may be fixed by the territorial board of equalization from year to year for the purpose of paying the interest on said funding bonds, and the cost of printing the same.

For costs of suit, and for such other and further relief as to the court may seem just and proper in the premises.

THE TERRITORY OF ARIZONA,
By E. S. CLARK, *Its Attorney General.*

TERRITORY OF ARIZONA, *County of Yavapai, ss:*

E. S. Clark, first having been duly sworn, upon his oath says: That he is the Attorney General of the Territory of Arizona; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, save and
78 except as to those matters therein alleged upon information and belief, and as to those matters that he believes it to be true.

E. S. CLARK.

Subscribed and sworn to before me this 1st day of June, A. D. 1905.

My Commission expires Sept. 11, 1905.

[SEAL.] EMMA CHURCH,
Notary Public.

EXHIBIT "A."

UNITED STATES OF AMERICA,

Territory of Arizona, County of Pima.

One Thousand Dollars. One Thousand Dollars.

The County of Pima in the Territory of Arizona, for value received promises to pay to the Arizona Narrow Gauge Railroad Company, or bearer, at the office of the Treasurer of said County in the

city of Tucson, on the first day of July, A. D., One thousand nine hundred and three, the sum of one thousand dollars in lawful money of the United States with interest thereon at the rate of seven per cent. per annum, said interest payable at the office of the treasurer of Pima County, semi-annually, on the first day of January and the first day of July in each year, on presentation and surrender of the interest coupons hereto attached.

This bond is issued by the Board of Supervisors of said
79 County of Pima, under and by virtue of an Act of the Legislature of Arizona entitled "An Act to Promote the construction of a certain Railroad," passed by the Legislative Assembly of the Territory of Arizona, and approved by the Governor thereof the 21st day of February A. D. 1883, and this bond is one of a series of Two Hundred issued in pursuance of said Act and exchanged for a like number of bonds of said railroad company of like amounts, bearing like interest, and running like time as the Bonds of which this is one.

In testimony whereof the said County by its Board of Supervisors has caused this bond and the coupons hereto attached, to be signed by the Chairman of the Board of Supervisors and countersigned by the Clerk of said Board, and by the County Recorder of the said County of Pima, and the said Clerk has affixed hereto the seal of said County, and the said Recorder has affixed hereto the seal of said County Recorder's office this first day of July, A. D. 1883.

JAMES H. TOOLE,
Chairman, Board Supervisors.
CHAS. R. DRAKE,
County Recorder. [SEAL.]

WILLIAM J. OSBORNE,
Clerk, Board of Supervisors. [SEAL.]

Bond No. 82.

Pima County Bond.

Coupon Number 40.

On the first day of July, A. D. 1903 the County of Pima, in the Territory of Arizona will pay to the bearer, at the County
80 Treasurer's office at Tucson, Thirty-five Dollars ($35.) being interest due on bond No. 82.

JAMES H. TOOLE,
Chairman, Board of Supervisors of Pima County.
CHAS. R. DRAKE,
Recorder of Pima Co.

WILLIAM J. OSBORNE,
Clerk, Board of Supervisors of Pima County.

(And here follows, attached to said bond, 39 coupons, numbered consecutively from 1 to 39, of like tenor and effect as above coupon, except as to date of payment and numbering of coupon.)

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81 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Come now the defendants in the above entitled cause and demur to the Second Amended Complaint of the plaintiff heretofore filed herein, and for cause of demurrer alleges:

That said Complaint does not state facts sufficient to constitute a cause of action.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

And answering said Second Amended Complaint of plaintiff heretofore filed herein, and in bar of plaintiff's right to sue, defendants allege that on the 29th day of October, 1894, at Washington, D. C., in an action then pending on appeal in the Supreme Court of the United States, between Charles Edward Lewis, as plaintiff and
82 appellant, and Pima County, defendant and appellee, and concerning the validity of the Arizona Narrow Gauge Subsidy Bonds, which are the identical bonds alleged to have been funded by the Loan Commission of the Territory of Arizona, in the First Amended Complaint in this action filed, and on account of the funding of which this action is maintained, judgment was duly given and made by said Court to the effect that the Legislature of Arizona, under and by virtue of an Act of the Legislative Assembly of the Territory of Arizona, entitled: "An Act to promote the construction of a certain railroad," approved February 21st, 1883, exceeded its powers in authorizing and requiring Pima County to issue its bonds in exchange for those of the railroad company in question, and that the bonds were, and are, void.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

And further answering said Second Amended Complaint of plaintiff heretofore filed herein, the defendants deny that on and prior to March 13th, 1903, or at any other time, the said County of Pima was lawfully, or at all, indebted to various and diverse persons, or to any
83 person, or persons, on one hundred and fifty (150) certain bonds known as the Arizona Narrow Gauge Subsidy Bonds, or upon any railway subsidy bonds whatsoever, of the de-

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nomination of $1000 each, or in any other denomination whatsoever. Defendants deny that any Arizona Narrow Gauge Subsidy Bonds alleged to have been issued by Pima County, or that any railway subsidy bonds of whatever character alleged to have been issued by said County, were, or are, in the hands of innocent purchasers thereof for value, or were or are, in the hands of any purchaser, or purchasers, whomsoever, for value, or otherwise. Defendants deny that any Arizona Narrow Gauge Subsidy Bonds alleged to have been issued by said County, or that any other railway subsidy bonds of whatever character alleged to have been issued by Pima County, are now, or ever were, legally valid or subsisting obligations against said County. Defendants deny that the amount of principal and interest due by said County of Pima upon the Arizona Narrow Gauge Subsidy Bonds, or upon any other subsidy railroad bonds alleged to have been issued by said Pima County, was on the 13th day of March, 1903, according to the terms of such alleged bonds, the sum of Three Hundred, Nineteen Thousand Seven Hundred and Ninety-one and 23/100 ($319,791.23) Dollars, or any other sum of money whatsoever, on said date, or at any other time prior or subsequent thereto. Defendants deny generally and specifically each and every the allegations contained in Paragraph II of plaintiff's said Complaint, save that defendants admit that said County of Pima, prior to December 31st, 1890, issued certain bonds, known and designated as
84 Arizona Narrow Gauge Subsidy Bonds, under and by virtue of the act of the Legislative Assembly of Arizona, entitled, "An Act to promote the construction of a certain railroad," approved February 21st, 1883, and save that defendants admit that a true copy of one of said bonds, is attached to plaintiff's said complaint, and that the other 149 bonds were of like tenor, and as to these admitted allegations, the defendants allege that the said Act of the Legislative Assembly of Arizona, was, and is, a void act, and that the bonds so issued by Pima County, under and by virtue of said Act were, and at all times have been, void, and without any force or effect whatsoever.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendants.
KINGAN & WRIGHT,
Of Counsel for Defendants.

And further answering said Amended Complaint of plaintiff heretofore filed herein, the defendants allege:

I.

That in 1882, the Arizona Narrow Gauge Railroad Company was incorporated under Act No. 49 of the Session Laws of Arizona, of 1879; That its alleged purpose was to construct a narrow gauge railroad from the City of Tucson, in Pima County, Arizona, in a northeasterly direction to the town of Globe, in Gila County,
85 Arizona.

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II.

That in the month of July, 1883, acting under the provisions of Act No. 35 of the Session Laws of Arizona of 1883, entitled: "An Act to promote the construction of a certain railroad," approved February 21st, 1883, the said railroad company presented $50,000 of its bonds to the Supervisors of Pima County, and thereupon the said Supervisors delivered to said railroad company therefor $50,000 of Pima County bonds, said bonds being a part of the subsidy bonds funded as set out in plaintiff's Complaint herein:—That at the time of the issuance of said bonds by Pima County to the said railroad company, the said railroad company owned no property, real or personal, and had done nothing except to incorporate, issue its bonds and execute a trust deed.

III.

That neither the officers, nor the people of Pima County, petitioned for the passage of said Act No. 35, nor did they subsequent to the passage of said act approve or consent to the same.

IV.

That thereafter the officers of said railroad company delivered to the said Board of Supervisors an additional $100,000 of said railroad bonds, and received in exchange therefor $100,000 of Pima
86 County bonds, in compliance with the terms of the said Act No. 35 of the Legislative Assembly of Arizona of 1883.

V.

That said railroad company graded a right of way and laid ties and rails for ten miles in a northerly direction from Tucson, Arizona, and discontinued its work: That no train, save one engine and a few dirt cars, were ever run upon the said railroad: That said railroad was built across a tenantless desert, and that the same in a few years fell into complete ruin and decay: That the rails were sold for old iron and nothing was left but a slight elevation in the desert to show where the proposed right of way had been: That no action was ever taken by the railroad company under the Acts of Congress to secure a right of way.

VI.

That Pima County never recognized the validity of the bonds so issued as aforesaid, and did not pay interest thereon, nor did Pima County recognize the funding bonds issued by the Territory in lieu of said narrow gauge bonds, as set forth in plaintiff's Complaint, nor has it paid any interest on such funding bonds.

VII.

That after the issuance of the bonds aforesaid to the railroad company in manner and form as aforesaid, one Charles Edward Lewis,

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the holder of such bonds, instituted a suit in the District Court
87 of Pima County, Territory of Arizona, to enforce the payment of 2250 coupons attached to certain of said bonds: That said case was taken to the Supreme Court of the United States, and decided October 29th, 1894, and that in said cause the said bonds were declared void.

VIII.

That many of the bonds issued by counties other than Pima in the Territory of Arizona, were effected by this decision: That some of these bonds had been issued to aid legitimate improvements: That their validity had been recognized by the counties and interest paid thereon: That because of this, the Legislature of Arizona memoralized Congress to validate bonds issued under legislative authority, the validity of which bonds had been acknowledged by the payment of interest: That thereafter the Congress of the United States, 1896, Volume 29, Statutes at Large, page 262, passed an act complying with the request of the memorialists.

IX.

That under and by virtue of the authority of said Act of Congress, and also under and by virtue of the authority of Act No. 79 of the Legislative Assembly of Arizona of 1891, permitting any holder of bonds to surrender them to the Loan Commission for funding, the holders of the identical Pima County bonds which had been declared void by the Supreme Court of the United States in 1894 as aforesaid,
offered to deliver these bonds to the Territorial Loan Com-
88 mission for funding: And did so deliver the same and did demand their funding: That in March 1903, the said Loan Commissioners of Arizona, did fund said bonds.

X.

That the Act of Congress of 1896 hereinabove referred to, did not and could not legalize the said bonds; that said bonds were and are void; that the action of the Loan Commission in funding the same was and is a void act, and that the action of said Loan Commission in funding the same, was and is not binding upon Pima County.

Wherefore, defendants pray that they be hence dismissed, with their costs.

BENTON DICK,
District Attorney, for Defendant.
KINGAN & WRIGHT,
Of Counsel for Defendants.

TERRITORY OF ARIZONA, *County of Pima, ss:*

E. L. Vail, Phil S. Hughes, and C. F. Richardson, having been by me first duly sworn, on their separate oaths, each for himself

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and not one for the other, says: That he is one of the defendants in the above entitled cause; that he is one of the duly elected, qualified and acting Supervisors of Pima County, Territory of Arizona; that he has read the foregoing Answer to the Second Amended Complaint of the plaintiff filed in said cause; that he knows the contents of
89 said Answer, and that the same is true of his own knowledge, save and except as to those matters alleged upon information and belief, and as to those matters that he believes it to be true.

E. L. VAIL.
P. S. HUGHES.
C. F. RICHARDSON.

Subscribed and sworn to before me this — day of June, A. D., 1905.

JOHN METS,
Notary Public.

My Commission expires Jan. 24, 1907.

90 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., as Supervisors of Pima County, Arizona, Defendants.

Comes now the plaintiff by E. S. Clark, Attorney General, and moves the Court for judgment, upon the pleadings herein, in accordance with the prayer of plaintiff's complaint.

E. S. CLARK,
Attorney General.

(Endorsed:) No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff, *vs.* E. L. Vail, Phil S. Hughes and C. F. Richardson as Supervisors of Pima County, Arizona, Defendants. Statement of Facts. Filed May 26, 1906. S. M. Cullom, Clerk.

91 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Be it remembered that heretofore and on to-wit the 1st day of April A. D., 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

On motion of Mr. E. S. Clark, attorney for Plaintiff herein, it is ordered that this cause be submitted.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-
92 wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., as Supervisors of Pima County, Arizona, Defendants.

In this cause, it is ordered that the Clerk of this Court issue Writ, returnable May 25, 1905.

And afterwards and upon to-wit the 25th day of May, A. D. 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

On motion of Attorney General, E. S. Clark, It is ordered that this cause be heard at this sitting of the Court.

On motion of Attorney General, it is further ordered that each side be granted thirty minutes for argument in this cause.

This cause now coming on for hearing was argued by Attorney General, E. S. Clark, for Plaintiff and by Mr. John B. Wright for Defendants, and cause ordered submitted.

93 And afterwards and upon to-wit the 26th day of May A. D., 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter*

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alia, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., Defendants.

In this cause, it is ordered that Defendants' demurrer be and the same is hereby, overruled.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:—

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., Defendants.

On motion of Attorney General, E. S. Clark, it is ordered that Plaintiff have 20 days in which to file Amended Complaint.
On motion of Mr. John Wright, it is ordered that Defendants have twenty days thereafter in which to file Answer.

94 And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., Defendants.

On motion of Attorney General, E. S. Clark, it is ordered that he be allowed to withdraw papers in the case of Charles Edward Lewis *vs.* Pima County, No. 355, for use in this cause.

And afterwards and upon to-wit the 27th day of September A. D. 1905, the same being one of the regular juridical days of the January Term A. D., 1905, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

On motion of Mr. Kingan, attorney for Defendants herein it is ordered that he be granted 60 days in which to file brief.

95 And afterwards and upon to-wit the 9th day of January A. D. 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., as Supervisors of Pima County, Arizona, Defendants.

On motion of Attorney General, it is ordered that Plaintiff herein have leave to file Motion for Judgment on the pleadings.

And afterwards and upon to-wit the 11th day of January A. D. 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., as Supervisors of Pima County, Arizona, Defendants.

On motion of Mr. E. S. Clark, attorney for Plaintiff herein,
96 it is ordered that this cause be set for hearing January 12, 1906.

And afterwards and upon to-wit the 12th day of January A. D. 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

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No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL ET AL., as Supervisors of Pima County, Arizona, Defendants.

It is ordered that this cause be submitted on briefs. It is further ordered that Defendants herein have until the 20th day of January in which to file their brief.

And afterwards and upon to-wit the 30th day of March A. D. 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

97 No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, —, Respondents.

This cause having been heretofore submitted, and by the Court taken under consideration, and the Court having considered the same and being fully advised in the premises: It is ordered that the Writ of Mandamus issue as prayed for.

It is further ordered, adjudged and decreed that the Plaintiff herein, do have and recover of and from E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, its costs in this court, taxed at Twenty-four and 25/100 ($24.25) dollars.

And afterwards and upon to-wit the 12th day of May A. D., 1906, the same being one of the regular juridical days of the January Term A. D., 1906, of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

98 It is ordered that the Motion for Re-hearing filed herein by Defendants, be submitted.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said Court in said cause, which said order is in words and figures, as follows, to-wit:—

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

It is ordered that the Motion for Re-hearing filed herein by Defendants, and heretofore submitted, be and the same is, hereby denied.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:—

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

Comes now Mr. John B. Wright for Defendants herein, in open court, and gives notice of appeal from the judgment of this
99 Court to the Supreme Court of the United States, and moves the Court that the appeal be allowed.

It is ordered that said motion be granted, and the appeal be and the same is, hereby allowed.

Comes now Mr. John B. Wright and moves the Court that the amount of the appeal bond be fixed in the sum of One Thousand ($1000) Dollars.

It is ordered that said motion be taken under consideration until this afternoon.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:—

No. 903.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

In this cause It is ordered that the amount of the Bond on Appeal be fixed in the sum of Five Thousand ($5,000) dollars.

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100 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Territory of Arizona, ss:*

I, Shelby M. Cullom, Clerk of the Supreme Court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 99, inclusive, contain a true and complete transcript of the Record and proceedings had in said Court in the case of the Territory of Arizona, Plaintiff against E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Respondents, as the same remain of record and on file in my office.

I further certify that the Citation attached hereunto, is the original Citation issued by said Supreme Court of the Territory of Arizona.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Supreme Court, at Phœnix, Arizona, this 11th day of July, 1906.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.
By ANGIE B. PARKER,
Deputy Clerk.

101 In the Supreme Court of the Territory of Arizona.

THE TERRITORY OF ARIZONA, Plaintiff,
vs.
E. L. VAIL, PHIL S. HUGHES, and C. F. RICHARDSON, as Supervisors of Pima County, Arizona, Defendants.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Territory of Arizona, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the City of Washington, on the 21st day of July 1906, pursuant to an appeal duly allowed by the Supreme Court of the Territory of Arizona, and filed in the Clerk's office of said Court on the 12th day of May, A. D., 1906, in a cause wherein E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona, are Appellants, and you are Appellee, to show cause, if any, why the decree and judgment rendered against the said Appellants, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Kent, Chief Justice of the Supreme Court of the Territory of Arizona, this 23rd day of May, A. D., 1906.

EDWARD KENT,
Chief Justice of the Supreme Court
of the Territory of Arizona.

102 [Endorsed:] No. 903. In the Supreme Court of the Territory of Arizona. The Territory of Arizona, Plaintiff, *vs.* E. L. Vail, Phil S. Hughes and C. F. Richardson, as Supervisors of Pima County, Arizona, Defendants. Citation. Filed May 31, 1906. S. M. Cullom, Clerk By Angie B. Parker Deputy. Service of a copy of the within Citation is hereby admitted this 28th day of May., A. D., 1906. E. S. Clark, Attorney General of the Territory of Arizona. Kingan & Wright, Attorneys for Defendant-.

Endorsed on cover: File No. 20,310. Arizona Territory supreme court. Term No. 345. E. L. Vail, Phil S. Hughes and C. F. Richardson, as supervisors of Pima county, Arizona, appellants, *vs.* The Territory of Arizona. Filed July 19th, 1906. File No. 20,310.

NOV 9 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 67.

E. L. VAIL, PHIL S. HUGHES, C. F. RICHARDSON,
SUPERVISORS OF PIMA COUNTY, APPELLANTS,

v.

TERRITORY OF ARIZONA, APPELLEE.

BRIEF FOR APPELLANTS.

SAMUEL L. KINGAN,
WILLIAM HERRING,
Attorneys for Appellants.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 29607

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Act 35, Laws of Arizona, 1883, and act of Congress of June 6, 1896, are void in so far as they relate to the Pima County Narrow Gauge bonds, in that each of said acts commands the expenditure of public funds, without the consent of the people, taxed for a private purpose, and that each of said acts commands the expenditure of public funds to aid a private corporation with no safeguard that the county of Pima should receive or obtain a public use or any adequate compensation 5

The act of Congress of June 6, 1896, is void in so far as said act relates to the county of Pima, in this—that at the time said act was passed the county of Pima was under no moral or legal obligation to pay the Narrow Gauge subsidy bonds, and that said act is tantamount to a judicial decree that the county shall pay, regardless of obligations 56

The decisions in the cases of Utter *et al. v.* Franklin, 172 U. S., 416, and Utter *et al. v.* Murphy, 186 U. S., 95, are not *stare decisis* for the reason that in neither of these cases were the points now urged presented to, considered or decided by the court 69

The decisions of this court in Utter *v.* Franklin and Utter *v.* Murphy, *supra*, are not *res judicata* for the reason that the parties to this action are not the same parties nor is the demand the same, and the appellant here was not a party to either of those cases; and, further, should it be held that appellant was a party, then it must be held that appellant and appellee here were codfendants, and, as this is an action between them alone, there can be no estoppel, for *judicata* has no application to codefendants or coplaintiffs who were not adversaries in the original action, and between whom no issues were made or matters determined 78

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 67.

E. L. VAIL, PHIL S. HUGHES, C. F. RICHARDSON,
SUPERVISORS OF PIMA COUNTY, APPELLANTS,

v.

TERRITORY OF ARIZONA, APPELLEE.

BRIEF FOR APPELLANTS.

Statement of the Case.

The Arizona Narrow Gauge Railroad Company was incorporated under the laws of Arizona. The Legislature of Arizona enacted in the year 1883 Act No. 35, Session Laws. The act is reprinted in full in the appendix of this brief and marked Exhibit A.

In July, 1883, in obedience to the mandate contained in Act No. 35, the Supervisors of Pima County executed and delivered to the railroad company $50,000.00 of Pima County bonds and received from the railroad company $50,000.00 of railroad bonds. At the time of the exchange, the railroad company had incorporated, issued bonds, executed a deed of trust, and that was all. It owned no property, real or personal. It was under

no obligation to build a railroad, and was at liberty to use the exchanged bonds for any purpose it saw fit. Afterwards the company graded ten miles of track and received from the county an additional $100,000.00 of county bonds in exchange for $100,000.00 of its bonds. The remaining $50,000.00 of bonds provided for in Act No. 35 were not exchanged. No trains were run on the ten miles of track, save one engine and a few dirt cars for construction purposes; the end of the track was in the midst of a desert. In a few years, and long prior to the year 1896, the track fell into complete ruin and decay, the rails were torn up, the ties removed, and nothing was left but a slight elevation in the sands to show where the right of way had been. No railroad was built or operated.

The inhabitants of Pima County did not ask for the enactment of act No. 35, and were given no opportunity to express their consent to or disapproval of it. At no time did they recognize the validity of the bonds issued, and refused to pay any interest thereon. Accordingly one Charles Edward Lewis sued the county on interest coupons. The case was appealed to this court, and it was decided that the bonds were void (Lewis *v.* Pima County, 155 U. S., 54). The decision affected other bonds than those of Pima County, bonds the validity of which had never been questioned and on which interest had never been regularly paid.

In this posture of affairs the Legislature of Arizona petitioned Congress to validate bonds issued under legislative authority, the validity of which had been acknowledged by the payment of interest. The memorial is reprinted in the Appendix and marked Exhibit B.

In June, 1896, and presumably in compliance with the memorial, Congress passed a validating act. It is contained in the Appendix and marked Exhibit C.

In 1887 the Legislature of Arizona enacted the Funding Act, and in 1890 Congress re-enacted it. The act provided for the funding by the Territory, through a funding or loan

commission, of county and municipal indebtedness and the issuing of territorial bonds to the holders of the local bonds. To the commission the holders of the Pima County bonds subsequent to June, 1896, presented them for funding. The commission refused to fund them. Whereupon an action was maintained in the territorial and this court to compel the commission to fund the bonds. Pima County was not a party to the action. In the end it was adjudged that the bonds should be funded and territorial bonds issued therefor.

It is provided by the Funding Act that the municipality whose bonds are funded shall reimburse the Territory for interest as it matures on the territorial bonds. Pima County has refused to pay this interest. The present is a mandamus proceeding, brought by the Territory, to compel Pima County to pay the interest now due and which the Territory has paid on the funded bonds. The action was instituted in the Supreme Court of the Territory, and that court granted the writ upon motion for judgment on the pleadings.

The questions involved are the validity of Act No. 35, Laws of Arizona, 1883, and the validity of the act of Congress of June 6, 1896 (29 Statutes at Large, 262), in so far as said latter act affects the Pima County bonds. It is claimed that both of these acts are unconstitutional, in that they contravene the Fifth Amendment of the Constitution; that as a consequence the bonds issued under one, and attempted to be validated by the other, are void, and that the County of Pima is not bound or estopped from setting up its rights and having them adjudicated by the decisions of this court rendered in the cases against the Loan Commission, *i. e.*, Utter *v.* Franklin, 172 U. S., 416, and Murphy *v.* Utter, 186 U. S., 95, or by the doctrine of *stare decisis*. The above questions were raised upon motion for judgment on the pleadings.

Specification of Errors.

1. The court erred in granting the motion of the plaintiff for judgment upon the pleadings.

2. The court erred in holding that the act of Congress of June 6, 1896 (volume 29, Statutes at Large, 262), could validate the Pima County Narrow Gauge Bonds issued in compliance with Act No. 35, Legislature of Arizona of 1883.

3. The court erred in holding that the act of Congress of June 6, 1896, is a valid act in so far as it relates to the validation of said bonds under said Act No. 35, Session Laws of Arizona of 1883, for that said act is in contravention of the Constitution of the United States.

4. The court erred in holding that said act of June 6, 1896, did or could validate said bonds for the reason that Congress had no power to validate bonds issued under Act No. 35, Laws of 1883.

5. The court erred in holding that the act of Congress of June 6, 1896, attempted to or did validate the said Pima County Narrow Gauge bonds issued in compliance with Act No. 35, Laws of the Territory of Arizona of 1883.

6. The court erred in holding that the decisions of the Supreme Court of the United States in the cases of Utter *v.* Franklin and Murphy *v.* Utter were *res judicata* or *stare decisis* upon the defendant in this action.

ARGUMENT.

First Specification of Error.

The court erred in granting the motion of the plaintiff for judgment upon the pleadings.

The argument on this specification will be considered in connection with the third and fourth specifications of error.

Second Specification of Error.

The court erred in holding that the act of Congress of June 6, 1896 (volume 29, Statutes at Large, 262), could validate the Pima County Narrow Gauge Bonds issued in compliance with Act No. 35, Legislature of Arizona of 1883.

The argument on this specification will be considered in connection with the third specification of error.

Third Specification of Error.

The court erred in holding that the act of Congress of June 6, 1896, is a valid act in so far as it relates to the validation of said bonds under said Act No. 35, Session Laws of Arizona of 1883, for that said act is in contravention of the Constitution of the United States, in this: That said Act No. 35 directed and commanded the issuance and delivery of bonds to a private corporation without the consent of the municipality, and for a purpose not public, and for a purpose from which the coerced municipality and its citizens could derive no benefit or compensation; and because said act directed and commanded the County of Pima to issue and deliver bonds to a private corporation for private purposes, and hence said act is repugnant to the due-process clause of the Fourteenth Amendment to the Constitution of the United States; and that the act of Congress of June 6, 1896, at-

tempting to validate said bonds issued under said act, is void, for the reason that said act is repugnant to the due-process and just-compensation clauses of the Fifth Amendment to the Constitution of the United States.

Act No. 35, Session Laws of Arizona, 1883, was void *ad initio*—void as printed in the statute book, regardless of anything done thereunder—

First, because the legislature had power to authorize counties to issue bonds only for necessary internal improvements, and the building of a railroad was not a necessary internal improvement.

Second, because the legislature directed and commanded the County of Pima to issue bonds in aid of a railroad company without the consent of the county, and without limitation or condition, save as to the first few miles of track, and with no assurance or guaranty that a railroad would ever be built.

Third, because the legislature directed and commanded the county, without its consent, to give and donate $50,000.00 of bonds to a corporation which owned no property, and was under no obligation to use the $50,000.00 in the construction of a railroad or for any public purpose, but was at liberty to keep the money and refuse to build a railroad or give any consideration for the bonds.

As to the first point above set out: The act was void because the legislature had no power to authorize the issuance of bonds to aid in the construction of a railroad.

When Charles Edward Lewis sued the County of Pima, in the early nineties, upon the interest coupons attached to the Arizona Narrow Gauge subsidy bonds, issued under authority of Act No. 35, Laws of Arizona, 1883, two defenses were interposed by the county. They were:

A. That the Act of 1883 was void, for the reason that the legislature might authorize the issuance of municipal bonds only for those purposes "as shall be necessary to the administration of its [the municipality's] internal affairs" (Act of June 8, 1878, c. 168, 20 Stat., 101), and that the construction of a railroad was not such a purpose.

B. That the Act of 1883 was void for the reason that it directed and compelled the County of Pima, without opportunity to express its consent or disapproval, to issue bonds in aid of a railroad company, without limitation or condition, save as to the first few miles of track, and with no assurance or guaranty on the part of the railroad company that a railroad would ever be built.

When the cause was heard in this court, the first defense only was considered, the court holding that bonds issued to aid a railroad company were obligations not necessary to be incurred in the administration of the county's internal affairs, and that Act No. 35 and the bonds issued thereunder were void.

The court says in regard to the second defense, the mandatory and compulsory character of the act:

> "But, in the view we have taken of the case, it is unnecessary to express an opinion on these points."
> Lewis *v.* Pima County, 155 U. S., 54.

It has therefore been definitely adjudicated, that Act No. 35 and the bonds issued pursuant thereto were void for lack of legislative power and authority.

As to the second point hereinabove set out: The act was void because the legislature directed and commanded the county to issue bonds in aid of a railroad company without the consent of the county and without limitation or condition, save as to the first few miles of track, and with no assurance or guaranty that a railroad would ever be built or operated.

Observe the character and elements of Act No. 35.

SECTION 1. The Board of Supervisors of Pima County is directed and required, when the president of the Arizona Narrow Gauge Railroad Company shall have notified the chairman of the board that the railroad company is ready to exchange bonds, to meet, and 'then and there to order issued two hundred thousand dollars of bonds of said county,' which bonds shall be delivered by the clerk of said board to the county treasurer.

"SECTION 2. When the railroad company shall tender fifty thousand dollars of its bonds to the treasurer, ' it shall be the duty of said treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the president and secretary of said railroad company in exchange,' for bonds of the company. Thereafter, when the company shall have graded, laid with ties and iron, five miles of road, the treasurer shall exchange fifty thousand of county bonds for a like amount of company bonds, and so on, until the county bonds are exhausted.

"SECTION 3. The bonds shall be payable twenty years after date, at the office of the county treasurer, and shall be signed by certain county officers.

"SECTION 4. The Board of Supervisors shall levy a tax to constitute the railroad fund.

"SECTION 5. The bonds of the railroad company shall be secured by deed of trust on all the property of the company, and shall be payable in twenty years after date; said deed of trust shall provide that bonds only to the amount of thirteen thousand dollars per mile shall be secured by the deed of trust or issued.

"SECTION 6. The Board of Supervisors may sell the exchanged railroad bonds.

"SECTION 7. The exchanged Pima County bonds may be purchased by the county.

"SECTION 8. If for any reason the Board of Supervisors do not meet as required, they may meet subsequently, and their acts shall be valid.

"SECTION 9. A copy of the articles of incorporation of the railroad company, as filed in the office of the territorial secretary, shall be sufficient identification of the railroad company, when certified by the territorial secretary," etc.

This act baldly commands the County of Pima, without an opportunity to express its will, to issue and deliver $200,000.00 of its bonds to a railroad company, $50,000.00 of the bonds to be delivered forthwith, and the remainder as fifteen miles of track shall be graded and laid with iron and ties. The railroad company is not obliged to build and operate a railroad between designated points, or to build and operate a road at all, but only to lay iron and ties for five, ten, or fifteen miles, as it may elect.

The question raised is this: Had the legislature the power to compel the county, without its consent, to issue bonds in aid of a railroad company and without limitation or condition; that is to say, to compel it, the municipality, to expend money for a use not public—a use from which, under the very terms of the act itself, the public, neither county nor Territory, could derive any benefit?

The power of the Legislature of Arizona at the time of the passage of Act No. 35 was as follows:

> "The legislative power in each Territory shall be vested in the Governor and Legislative Assembly" (section 1846, R. S. U. S.).
>
> "The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistant with the Constitution and laws of the United States" (section 1851, R. S. U. S.).

It will be seen that the question is one touching the fundamental law. How far may the legislative power go in compelling the citizen, whether as an individual or grouped in a municipality, to pay taxes for a local improvement, from the very nature of which he can derive no benefit, and hence receive no consideration?

At the outset, it is a pleasure to find that in a country which has produced many great judges, some of the ablest have given their attention to this matter. We quote at length:

"The power of municipal corporations, when *authorized* by the legislature, to engage in works of internal improvements, such as the building of railroads, canals, harbors and the like, or to loan their credit in aid thereof, and to defray the expenses of such improvements and make good their pledges by an exercise of the power of taxing the persons and property of their citizens, has always been sustained on the ground that such works, although they are in general operated and controlled by private corporations, are nevertheless, by reason of the facilities which they afford for trade, commerce and intercommunication between different and distant portions of the country, indispensable to the public interests and public functions. It was originally supposed that they would add, and subsequent experience has demonstrated that they have added, vastly and almost immeasurably to the general business, the commercial prosperity, and the pecuniary resources of the inhabitants of the cities, towns, villages and rural districts through which they pass and with which they are connected. It is in view of these results, the public good thus produced, and the benefits thus conferred upon the persons and property of all the individuals composing the community, that courts have been able to pronounce them matters of public concern, to the accomplishment of which the taxing power might lawfully be called into action. It is in this sense that they are said to fall so far within the purposes for which municipal corporations are created, that such corporations may engage in or pledge their credit for their construction. Upon no other principle can the exercise of the power of taxation for such objects be sustained. And in doing so the courts have never, to my knowledge, extended it to cases where it was not apparent that the members of the corporation concerned would be benefited by the construction of the work contemplated."

* * * "The inquiry is whether, where the supposed contract of a public corporation is absolutely void for want of capacity to enter into it, a subsequent legislative ratification or recognition of it is sufficient, *'proprio vigore'* and without any evidence

that such ratification or recognition was procured at the instance or with the assent of the corporation, or that the corporation has subsequently acted upon or confirmed it, to give such contract, life and vitality, and make it obligatory upon the corporation." * * *

"I do not understand that the city, by any appropriate action, petitioned or asked for the passage of the act; nor is it averred that it subsequently ratified or assented to it. On the contrary, I infer from this proceeding that it has refused to be bound by it, or the contract to which it has reference. Under these circumstances the question is, Can the legislature, by recognizing the existence of a previously void contract and authorizing its discharge by the city, or in any other way, coerce the city against its will into a performance of it, or does the law require the assent of the city as well as the legislature in order to make the obligation binding and efficacious? I must say that, in my opinion, the latter act, as well as the former, is necessary for that purpose, and that without it the obligation cannot be enforced." * * *

"It follows from what I have already said, that in my opinion this is not a defect which can be reached by the retroactive power of the legislature alone. It cannot, because in so doing the legislature would interfere with vested rights of property. It would of its own mere motion create an obligation where by law none before existed; it would impose a liability against the will and without the consent of the party to be charged. This the legislature cannot do."

Dixon, C. J.—Hasbrouck *v.* Milwaukee, 13 Wisconsin, 38-50.

While the above case treats of a retroactive law, the principle enunciated is pertinent to the present inquiry—the power of the legislature to compel municipalities to assume burdens for other than strictly public or governmental purposes.

"It has been sometimes supposed that the case of Hasbrouck *v.* The City of Milwaukee, 13 Wis., 37, is in conflict with this principle, but a moment's consideration will show that it is not. The question there

was not as to the power of the legislature to ratify or correct proceedings defectively taken for the assessment or collection of taxes, but as to its power to create a contract which should be binding upon the municipality, without the consent of the people thereof, or of some officer or officers representing them. It was a question as to the power of the legislature to infuse life into a void contract, against the will of the voters and taxpayers of the city, and without the assent of the common council, which alone was authorized to act in their behalf. The taxation in that case, which would have resulted from the creation of a valid contract on the part of the city, was taxation in the course of a special proceeding, and that for which a special enabling act was required, and not taxation for purely public purposes, over which this unlimited power of legislature prevails. It was a species of taxation which it has been held the legislature may authorize, subject to the ratification or consent of the proper local authorities or of the people of the municipality, but not without such ratification or consent." * * *

"It would be, for example, something new to this court were it to be held that the legislature could compel a town or city to subscribe to the stock of a railroad company, or directly impose taxes for that purpose, without the assent of the people of the town or city, or of their officers. We are not aware that legislative action of this kind has ever yet been attempted by any legislative body, or that it has received the sanction of any judicial decision."

Dixon, C. J.—Mills *v.* Charlton, 29 Wis., 413-414-415.

"Whoever insists upon the right of the State to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to

show any constitutional basis for one under which the people of other parts of the State, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reasons for opposing and contesting it would be the same in each case."

Cooley, J.—Board of Commissioners *v.* Common Council, 28 Mich., 241.

"The relators have cited numerous cases as authority in support of the point they make, but they have failed to find a case wherein it has been held that the legislature can compel a city, against its will, to incur a debt by the issue of bonds for a local improvement. While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have, in their franchises, no vested right, and whose powers and privileges the creating power may alter, modify or abolish at pleasure, as they are but parts of the machinery employed to carry on the affairs of the State, over which and their rights and effects the State may exercise a general superintendence and control," * * * "we are of the opinion that power, such as it is, cannot be used to compel any one of our many cities to issue its bonds against its will to erect a park, or for any other improvement—to force it to create a debt of millions—in effect, to compel every property-owner in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted." * * * "If the principle be admitted, that the legislature can, uninvited, of their mere will, impose such a burden as this upon the city of Chicago, then one much heavier and more onerous can be imposed—in short, no limit can be assigned to legislative power in this regard.

> If this power is possessed, then it must be conceded that the property of every citizen within it is held at the will and pleasure of the legislature. Can it be that the General Assembly of the State, just and honest as its members may be, is the depository of the rights of property of the citizens? Would there be any sufficient security for property if such a power was conceded? No well-regulated mind can entertain the idea that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of such legislation. We fail to perceive any real difference in principle in forcing this burden upon the city and imposing a like burden by the direct action of the legislature upon individual property-owners within it, for in both cases the debt at maturity must be paid by such holders, while the accruing interest is a constant drain upon their resources. No case, amid the multitude which have been cited by the relators, goes to the extent of this, and with our understanding of the Constitution, no warrant is found there for such legislation."
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> Breese, C. J.—People *v.* Mayor, 51 Ills., 31-32-33.

While the above case refers to the Constitution of the State of Illinois, yet the language used is apt and pertinent to the present inquiry.

> "The power of the legislature over municipal corporations is not supreme. While they may be compelled by legislative enactment to provide for the construction and maintenance of improvements of a public character exclusively, or to enter into a contract for an exclusively public purpose, they cannot be compelled to contract for a private purpose or to aid in the construction of works which, although public in some respects, are private in others.
>
> "Railroads owned and operated by corporations for the benefit of their stockholders are not public highways in the same sense as are common roads. A railway corporation is public as to its franchises, but private as to the ownership of its property and its re-

lation to its stockholders, and a municipal corporation in subscribing for its stock acts as a private corporation. A municipal corporation, therefore, cannot be compelled, without its consent or that of its taxable inhabitants, and aginst its will to become such a stockholder, and a mandatory statute requiring it to issue its bonds without such consent and to invest the proceeds of the sale thereof in, or to exchange the same for stock of, a railroad corporation is unconstitutional." (From the syllabus.)

Grover, J.—People *v.* Batchellor, 53 N. Y., 128.

"Now it is a fundamental element in all contracts—indeed, in any possible idea of a contract—that the party to be bound must have assented to the contract, either expressly or by implication. In this case there was no assent on the part of the town; so that on common principles there was no contract, either express or implied.

"If the town is to be bound as by contract, it must be by compelling force of the law in question.

"Can the town be thus compelled to become a party to, and be bound by such a contract? State legislatures are restrained by the Constitution of the United States from enacting laws impairing the obligations of contracts. The legitimate force and application of the principle of this provision would prohibit the enactment of any law to compel a person to make or become a party to a contract.

"But, passing this, it is prominent for notice that the judges and courts that have gone farthest in sustaining laws of State legislatures against the restrictive provisions of constitutions repudiate entirely the idea that a person, whether natural or artificial, can be compelled by legislative enactment to become a party to, or to be subjected to liability upon, a contract without his consent."

Barratt, J.—Alkins *v.* Town of Randolph, 31 Vt., 236.

"But it is believed the legislature has no power, against the will of a municipal corporation, to compel

it to contract debts for local purposes in which the State has no concern, or to assume obligations not within the ordinary functions of municipal government. Such matters are to be disposed of in view of the interests of the incorporators exclusively, and they have the same right to determine them for themselves which the associates in private corporations have to determine for themselves the questions which arise for their corporate action. The State in such cases may remove restrictions and permit action, but it cannot compel it."

Cooley, Constitutional Limitations, page 337, seventh edition.

"But the legislature cannot by an imperative statute compel a municipality, without its consent or that of its inhabitants, to create a debt to aid in the construction of a railway."

Dillon, Municipal Corporations, part of sec. 74, vol. 1, pages 125 to 126.

A county is a municipal corporation and within the purview of the authorities quoted. It differs from certain forms of municipalities, but we conceive that village, town, city, and county are all in the same class, in so far as the present discussion is concerned.

What is the "consent" of the municipality referred to in the cases quoted? Is it the free, voluntary consent, the consent of the law of contracts, or is it a consent by coercion, by compulsion, by the mandate of a superior power? In other words, is the action of the Board of Supervisors of Pima County in issuing the bonds, under command of the legislature, "consent"?

The use of the word "consent" by the authorities signifies the free, untrammeled act of the municipality; it means that the political division to be bound shall have the right to decide for itself whether or not it shall do or not do the thing. To give the word any other meaning would be to add to it a significance hitherto unknown, and repugnant to the law. An act which did not provide for consent, but which

purported upon its face to be a grant of power—a permission, an authority—would be valid, for under it, if not by express terms, yet by implication, the municipality might express its will; but an act which directs and compels, which allows no opportunity for discretion, which by its terms coerces, cannot be said to permit consent.

It is the people who must consent. "It is a cardinal principle of our system of government that local affairs shall be managed by local authorities" (Chief Justice Fuller, 129 U. S., 147). The people must consent directly or indirectly, by themselves or by officers duly authorized.

The court will take judicial knowledge of the powers of boards of supervisors in Arizona at the time Act No. 35 was passed. These powers concerned the ordinary affairs of the county and nothing else. The people had not authorized the Board of Supervisors of Pima County to consent or refrain from consenting to the issue of railroad bonds, nor anything germane thereto. The supervisors were no more authorized to do this than was the sheriff or the superintendent of schools. If the legislature might command the supervisors, and if the supervisors take action under the command, and by so doing it be held that the people consent to their act, then the legislature might command the sheriff or school superintendent, or a person in no manner connected with the county, to issue the bonds, and upon his acting the people be held to have consented.

> "A representative, as we understand it, is one chosen by a principal to exercise for him a power, to perform for him a trust. In that sense the mayor of Detroit is a representative for some purposes, the members of the common council for others, and the members of the board of education for still others. But the idea of a representative implies not merely a person chosen for some purpose, but a person chosen for a particular purpose, and confided in to represent his principal therein. * * * That government would be a mockery of republican institutions which, while leaving to the people a choice of officers, should

> afterwards determine whether any particular officer who had been selected by the people should be a legislator or a judge, a governor or a policeman. * * * What we desire clearly to express is simply this: That that is not a representative government in which the people are not permitted to say in what trusts their agents shall represent them. * * * They did not say to them, we choose you our agents for anything the legislature may hereinafter direct you to do on our behalf, but we choose you our agents to perform this particular duty. * * * No precedent entitled to respect can justify such a change of powers; for from the very dawn of our liberties the principle most unquestionable of all has been this: That the people shall vote the taxes they are to pay, or be permitted to choose representatives for the purpose."
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> Cooley, J.—Board *v.* Common Council, 28 Mich., 245, 246, 247, 248.

If the legislature may command a board of supervisors, having no such powers when elected by the people, to issue bonds without the consent of the people, and yet the action of the board in issuing the bonds be held the consent of the people, then the legislature may issue the bonds itself without regard to the county and without its knowledge, and this still be held the consent of the municipality; and if the legislature may do this in aid of a railroad corporation, then it may do it in aid of a telephone company, a telgeraph company, an express company, a canal company, or any corporation that may serve the public. The citizen would hold his property, if this were true, not only subject to taxation for government and strictly public matters—over which it is conceded that the legislature is almost omnipotent—but also to aid and enrich any group of persons who might organize themselves into a so-called public-service company—and yet be held to have consented to all, and so forever estopped. If this be the law, then local government for purposes not essentially public is abolished, and the sole consent required is that of the legislature—a principle at odds with the authorities and at variance with American institutions.

It cannot be urged that even the Board of Supervisors consented to the act of the legislature by issuing the bonds, for that can scarcely be called a consent where an inferior, largely ministerial body obeys the command of a superior. It cannot be said that the supervisors would have issued the bonds without the act of the legislature, but it may be said that they issued the bonds solely because they were so commanded.

It is set up in the answer, and for the purpose of this appeal admitted to be a fact, "That neither the officers nor the people of Pima County petitioned for the passage of Act No. 35, nor did they subsequent to the passage of said act approve or consent to the same" (Record, page 23, folio 45). Neither actually, therefore, nor by construction of law have the people of Pima County, in the light of the quoted cases, given their consent to Act No. 35 or any obligation it sought to impose.

It was in 1869 that the Supreme Court of Illinois used the language heretofore quoted, that counsel had "failed to find a case wherein it has been held that the legislature can compel a city, against its will, to incur a debt by the issue of the bonds for a local improvement" (51 Ills., 31). Thereafter in Commissioners of Revenue *v.* The State, 45 Ala., 339, it appeared that the legislature had created a local board, appointed by the Governor as a board for the improvement of the river, harbor, and bay of Mobile, and required the commissioners of revenue of Mobile County to issue to them for that purpose county bonds to the amount $1,000,000.00, and to levy a tax to pay them. Here was an appointment by the State of local officers to make, at the expense of the locality, an improvement both local and general without the consent of the locality. The Supreme Court of the State sustained the act, unquestionably going further in doing so than had been gone in any case up to that time. The litigation was afterwards carried into the Federal courts and was adjudicated in this court in 1880. It was then held that the act of the legislature of Alabama was not repugnant to the article

of the Constitution which forbade the taking of private property for public use without just compensation, or for private use, or the use of corporations other than municipal, without the consent of the owner; that the act was within the general taxing power of the legislature, and was for a purpose "public in its character, designed to be of general benefit to the State, but more especially and immediately to the county;" and that when a public work is authorized it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray the cost shall be raised, to the extent of *prorating* the burden upon all the divisions benefited, or fixing the whole upon the division specially and immediately benefited.

> Field, justice.—County *v.* Kimball, 102 U. S., 702-3-4.

This is an advance over the State cases cited. The legislature may, for a strictly public work, such as the improvement of a harbor, unless restrained by the organic law, require a municipality to issue bonds, and levy taxes to pay them, without the consent of the municipality; and, further, may fix the burden upon the municipality, where more than one is benefited, which, in the legislative judgment, shall be especially benefited. All of this, however, is subject to one limitation. Here not only was the improvement exclusively public, but the whole State was benefited. The improvement, therefore, was not a purely local one, but general. The court does not go the length of saying that for a public improvement, purely local, in which the remainder of the State is not interested, the legislature may require the improvement to be made. The distinction has since been made by the Supreme Court of Oregon.

> "There is a line of authorities holding, and perhaps properly, that a municipal corporation cannot be burdened with a debt without its consent for a matter of local, as distinguished from State, purposes

(Board of Park Commission *v.* Council of Detroit, 28 Mich., 228; People *ex rel. v.* Mayor of Chicago, 51 Ills., 17; People *ex rel. v.* Batchellor, 53 N. Y., 128). But it seems to be substantially agreed that when the debt or liability is to be incurred in the discharge of some duty which is imposed upon the municipality exclusively for public purposes, and in the performance of which the general public, as distinguished from the inhabitants of the particular municipality, have an interest, it is within the power of the legislature to compel it to perform such duty and incur a debt therefor."

Simon *v.* Northup, 27 Or., 495-6.

The Supreme Court of Michigan, in a case arising under a statute relating to a public park for the city of Detroit, which created a board of park commissioners for the city, the act naming the commissioners and investing them with power to acquire by purchase the necessary lands at a cost not exceeding $300,000.00, and imperatively requiring the city council, without its assent to the appointment of commissioners or to purchase the lands by them selected, to provide the money to pay therefor by the issue and sale of the bonds of the city, held that the city could not be compelled against the will of the council to issue its bonds; and the decision was placed on the ground that a park was purely a matter of local, as distinguished from State, concern, and that it was beyond legislative competency to coerce a municipal corporation to contract a debt for local purposes without its consent.

"That the judgment of this able court in the Detroit Park case, as well as the argument of the eminent judge in the opinion by which it is supported, is, in the author's judgment, not only sound, but it is in accordance with the weight of judicial expression on the subject."

Dillon, Municipal Corporations, vol. 1, secs. 72 and 73, fourth edition.

It was doubtless, then, the fact that the improvement in the Mobile case was a strictly public one, and that it was of interest to the whole State, and hence not local, that led the great judge who rendered the decision to use the language that he did.

It is often extremely difficult to draw the line between those improvements which are strictly local and those in which the State has an interest. Broadly speaking, the State is interested in all of its parts and subdivisions, from its great counties to the most insignificant villages. It is probably upon this theory that respectable courts have held that the legislature may compel a municipality, without or against its consent, to construct works apparently local, such as court-houses, jails, and bridges, and even in one extreme case, that of Pennsylvania, a city hall. Admitting, then, this broad and searching interest of the State in all of its municipalities, we are brought to the result, that the legislature may compel any division of the body politic to issue bonds, without consent, to aid in the construction of any work of a strictly public governmental character, although apparently local in its nature. This is an enlargement upon the law of the Mobile case, for there the work was of unquestioned State interest, and is at variance with the Wisconsin and other cases, already quoted.

But beyond this the law does not go; beyond this the legislature may not compel, but only authorize. The improvement for which coercion may be used must be public—exclusively and strictly so—and governmental in its nature. Municipalities may be authorized to engage in or lend aid to enterprises of a private or quasi-public character, but may not be driven to do so.

This court severely criticised the Legislature of Alabama in the Mobile case; but had the Legislature of Alabama in that case compelled the County of Mobile to issue $1,000,000.00 of bonds, and to deliver them to the Mobile Improvement Company, a private or quasi-public corpora-

tion, said company to use the bonds in improving the harbor, the harbor when improved to belong to the company (if such were possible), and the company to have the control thereof and collect toll from the public for its use, we cannot believe the act would have been upheld.

Were the legislature of a State to compel a county to issue bonds to an individual or a corporation to aid in the construction of a court-house, the house when completed to belong to the builder and not to the county, the house to be under the control of the builder, and the county to pay rent to him for the use of it, such an act could not be sustained, and the same would be true of a bridge or a highway.

If a legislature should say to a city, We command and direct you to issue $100,000.00 of bonds to the Lincoln Park Company for the purpose of aiding that company to acquire and own a park in the city of Chicago, the park when acquired to belong to the Lincoln Park Company, and that company to have the right to charge the citizens of Chicago for its use, the act would be void; and the same would be true of a bridge in that city, or any other work of improvement. Suppose a State saying to its counties, We command and direct you each to issue $100,000.00 of bonds to the Canal Company, to aid that company to build a canal, the canal when built to belong to the company, and the company to have control of it and charge for every ton that may be transported thereon, would the act be upheld? Or were the legislature to command a county to issue $100,000.00 of bonds to aid in the construction of a telegraph line, the line when completed to belong to the company, and the company to have the right to charge a toll for every message transmitted, would the act be upheld? And the same would be true of an express company, a telephone company, a street-car company, or any public-service corporation.

It is often of as much benefit to a county to have ships come into its ports as to have steam-cars come into its depots. Both transport passengers and freight from distant parts.

May a county be compelled to issue bonds to a ship company to aid that company to purchase ships, which when acquired shall belong exclusively to the company, and for the use of which ships the county must pay the same as for the use of ships which it did not issue bonds to buy? If a county may not be compelled to aid in the purchase of ships which navigate the sea, why should it be compelled to aid in the building of a railroad, which crosses the land? In principle, there is no difference between a railroad and a steamboat line. If the legislature may compel a county situate on the Mississippi River to lend its aid and credit to an inland railroad, so it may to a line of steamboats plying on the river. Such acts are void, not only because they destroy local government and are repugnant to American institutions, but because they compel municipalities to aid in improvements and enterprises not strictly and exclusively public; because they compel them, in the event stock is received in the various concerns for the bonds, to go into business, to participate in—become in effect partners in private ventures; because they compel them to go outside and far away from things political and governmental and engage in things private, or at most of a quasi-public nature. That municipal corporations may own and control property as private individuals is not questioned, but that any power may compel them to do so is quite as much in this regard as in the case of an individual.

Municipal corporations may be said to have both a public and private side. The public side has to do with public matters; as such, the corporation is an arm of the State, organized and existing to carry out the will of the State, and its own strictly public functions of more limited concern, but in which, broadly, the State has an interest. The private side has nothing to do with government, but is of a business nature. In one it may be commanded; in the other only authorized. Thus, if a plot of ground by deed of gift becomes city property, we do not apprehend that the legislature could compel the city either to give it away, or exchange it, or use it for a particular purpose. The legislature might

deprive the city of its charter, for that is public and pertains to government, but it could not seize upon and divest it of its property by mere legislative will, or do anything equivalent thereto.

At least one line of demarkation between those things which a municipality may be compelled to do, or merely authorized, is that of ownership. The use of a thing may be public, it is true, and the ownership private; yet the thing itself not public, but only partly so. Thus a bridge in a city may be owned by a private corporation, tolls charged, and the bridge put to a public use. An act of the legislature requiring the municipality to purchase the bridge, and then put it to free public use, might be upheld (47 Md., 145); but an act requiring the city to improve and repair the bridge, the bridge still to belong to the private corporation, and it to retain the right to charge tolls as before, should not. The use in both instances would be the same—that is to say, public—but the ownership would not. In one instance the exercise of power by the legislature in commanding would be strictly public and governmental; in the other it would be nothing more or less than compelling the municipality to expend the public funds for a purpose not public and governmental, and in effect to enrich a private corporation, although the public might derive some benefit from the repairs. This point is well stated in the opinion of Justice Grover, already quoted.

> "The power of the legislature over municipal corporations is not supreme. While they may be compelled by legislative enactment to provide for the construction and maintenance of improvements of a public character exclusively, or to enter into a contract for an exclusively public purpose, they cannot be compelled to contract for a private purpose or to aid in the construction of works which, although public in some respects, are private in others."
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> People *v.* Batchellor, 53 N. Y., 128.

"The legislation in question is open to serious criticism. It compels a large, if not extravagant, expen-

diture of money, and imposes onerous burdens upon the people without their consent. If the object of the expenditure was private, or if the money to be raised was directed to be paid to a private corporation, who were authorized to use the improvements for private gain, the question, in my judgment, would be quite different; and in that respect there is a limit beyond which the legislative power cannot legitimately be exercised."

People *v.* Flagg, 46 N. Y., 405-6.

"Nor do we think it can be successfully denied that the bridges and ferries referred to in the act under consideration will, when acquired, belong to the city of Portland in its public or governmental capacity; and that in the acquisition of them it is discharging a public or State duty which it is entirely proper for the legislature to impose upon it," etc.

Simon *v.* Northup, 27 Oregon, 296.

It should follow, upon the reason and authority of the cases cited, that aid to a railroad corporation is not of that strictly public and governmental character that may be compelled by the legislature, and hence is not the rightful exercise of legislative power.

There have been, it is true, expressions by justices of this court going to the length that the legislature of a State may compel a municipality to issue bonds in aid of a railroad; but there has been no adjudication to that effect.

In United States *v.* Railroad, 17 Wallace, 322, for instance, the question was whether the revenues of a municipal corporation were subject to taxation by Congress under the Internal Revenue Act of June 30, 1864. The city of Baltimore had voluntarily, under the authority of the State legislature, issued $5,000,000.00 of bonds to aid the Baltimore and Ohio Railroad, and was secured by interest-bearing securities. The sole question in the case was whether under the said revenue act a tax could be enforced against the city upon interest accruing under these securities, and it was held that it could not. The power of the Legislature of the State

of Maryland to compel the city of Baltimore to issue its bonds and raise money for the railroad was not even remotely involved. The justice says, however:

> "The power in question (power to issue the bonds) was conferred because its exercise concerned the public and to benefit the public. This power could, no doubt, have been imposed upon the city as a duty, and its exercise directed without the assent or against the wish of the corporation or its citizens."

This is *obiter*. Justices Miller and Clifford in their dissenting opinion, and which dissenting opinion has to do with the case before the court, sound the key-note of the matter:

> "Property owned by a municipal corporation and used as means or instruments for conducting the public affairs of the municipality may not be subject to Federal taxation, as it may perhaps be regarded as falling within the implied exemption established by a recent decision of this court. * * * But concede, for the sake of the argument, that the means and instruments for conducting the public affairs of the municipality are entitled to the same exemption from such taxation as the revenues of the State, it by no means follows that the private property owned by such a corporation, and held merely as private property in a proprietary right, and used merely in a commercial sense for the income, gain, and profits, is not taxable just the same as property owned by an individual or any other corporation. Such a right is one which may be of great value to the Government in time of war and imminent public danger, and one which the United States ought never to surrender.
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> "Corporations of this kind are very numerous, and they may, and often do, own large amounts of bank stock, bonds and stock of railroads, vacant lots and other real estate of great value, and many other species of personal property and choses in action never used or intended to be used as means or instruments for conducting the public affairs of the municipality, and in respect to all such property the right of Congress to pass laws subjecting the same to taxation with the

> property of the citizens generally is as clear, in my judgment, as it is that the power to lay and collect taxes, duties, imposts, and excises is vested by the Constitution in the national legislature."

Here is the distinction, clearly recognized, between the strictly public and governmental side of a municipality and its private or business side. In one it is a creature of the State, under the complete domination of the State, a part of the State, and not subject to taxation; in the other its functions are more or less private, and in this respect it should be classed with individuals and citizens generally. While the reference is to a city, and it may be said that a county is more intimately connected with the State, yet the principle fully and completely applies.

In People *ex rel.* Le Roy *v.* Hurlbut, 24 Mich., 44, Judge Cooley states the rule:

> "They rest upon the well-understood fact that these corporations are of a twofold character; the one public as regards the State at large, in so far as they are its agents in government; the other private, in so far as they are to provide the local necessities and conveniences for their own citizens; and that, as to acquisitions they may make in the latter capacity as mere corporations, it is neither just, nor is it competent, for the legislature to take them away, or to deprive the local community of the benefit thereof."

In the case now before the court, had the County of Pima voluntarily issued its bonds in exchange for the railroad bonds, it must then of necessity have held the railroad bonds, not as an agent of the State, not as part of those things relating to the government of the State or county, but as the county's private property, out of which, if authorized, it might have made profit by sale, and the profit belonged exclusively to the county, and which profit it might have disposed of in any lawful manner. Counties draw their powers from the State, but it does not follow that they may be compelled by the State in all things.

In the case of Thompson *v.* Perrine, 103 U. S., 806, this court refused to follow the Court of Appeals of New York in its latest utterances upon the subject (Horton *v.* Town of Thompson, 71 N. Y., 513), and stated, among other things, that the Legislature of New York, unless restrained by the organic law of the State, could authorize or require a municipal corporation, with or without the consent of the people, to aid by a subscription of capital stock in the construction of a railroad, having connection with the public interests of the people within the limits of such municipality, and to provide for payment by an issue of bonds or by taxation.

The facts of this case should be closely examined.

The Legislature of the State of New York authorized commissioners on behalf of the town of Thompson to borrow on the credit of the town a certain sum, and to execute bonds therefor, but the debt was not to be contracted nor the bonds issued until there was obtained the written consent of the majority of the taxpayers, such consent to be evidenced by affidavit. The commissioners were authorized to dispose of the bonds, and the money received was to be invested in the stock of a railroad. The commissioners, instead of following the statute, exchanged the bonds direct with the railroad company, and it would appear that the consent given did not state the name of the railroad in whose aid they were issued. The legislature, after the bonds were issued and interest paid thereon by the town, and the road had been built, passed a curative act curing two things: 1, the fact that the bonds had been exchanged direct with the company, instead of sold and the proceeds delivered to the company; 2, the fact of any defect or omission in the consent in or by reason of said consent not stating the name of the railroad to which the taxpayers so signing such consent desired the money to be paid.

At once it will be perceived that the question now under discussion was not involved. No act had been passed compelling the issue of bonds to aid a railroad company without the consent of the locality. An act had been passed authoriz-

ing the aid, upon consent first obtained. The basic principle, the power to force and compel a locality to aid a company, is not in the case. There were defects and irregularities in the issuance and delivery of the bonds only. The bonds themselves were authorized and consented to, and their issuance afterwards ratified by the payment of interest. They were exchanged instead of being sold, and the consent did not contain the name of the company. These were things the legislature might have provided for in the first instance; they were mere details, all following the one great thing, the free, voluntary consent of the taxpayers. Neither in the original act authorizing the bonds, nor in the curative act, did the legislature attempt to compel the issuance of bonds without consent. The two defects, such as an exchange instead of sale, and the name of the road in the consent, do not reach the question of compulsion; and as before stated, the act only cures those defects which beyond question the legislature might have provided for in the first place. The fact that the taxpayers did not consent to the issue of bonds to be exchanged, but only to be sold, and did not name the particular railroad to be aided, does not change the matter; the taxpayers did consent to the issue of the bonds, and did consent that these bonds should be issued to aid a railroad company which would build a railroad in their locality. These are the big essential facts. If there was a consent, but that consent was defective, because it did not contain the name of the company to be aided; if bonds actually were consented to, but were to be sold and not exchanged, then the legislature might act, for as it imposed the conditions in these respects, so it might release them. The bonds were void solely because they had not been issued and exchanged as the legislature required. Of course, the legislature could overlook these defects, and as the bonds were void only because of the disobedience, declare them valid. This is a different proposition from declaring that the legislature had the power of compelling a municipality to issue bonds to aid a railroad without the consent or even the knowledge of the municipality.

All decisions are to be construed in the light of the facts before the court; the language of the judges is decisive or *obiter* in the light of the facts; the question we are now discussing was not before the court and was *not decided*.

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
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> Cohens *v.* Virginia, 6 Wheat., 264-399.
> Quoted with approval in Downe *v.* Bidwell, 182 U. S., 258-259.

There are other cases in this court to which we might refer, and draw the distinction, as in the cases of United States *v.* Railroad, and Thompson *v.* Perrine, but it is not necessary. We have been unable to find a case, either in this or any court of repute, where, *on the facts before the court*, it has been decided and adjudged that it lay in the power of the legislature to compel a municipality—drawing carefully the distinction between compel and authorize, about which latter there is no question—without or against its consent, to issue bonds in aid of a railroad company.

But, to go further and place the question under this head of the argument squarely before the court: Grant that the legislature of a State may compel a municipality, without or against its consent, to lay taxes to aid a railroad company, may it do so without condition or limitation? May it compel the municipality, to illustrate, to pay $100,000.00 to a railroad company to lay one mile of track, the railroad com-

pany to be under no obligation to build a railroad or run a train?

Act No. 35 directs that when the Arizona Narrow Gauge Railroad Company shall have graded and laid with ties and iron five miles of track, the County of Pima shall exchange with it $50,000.00 of bonds. The company, in order to obtain the $50,000.00 of bonds, has therefore but to do these things. Thereafter, if the company shall elect, it may grade and lay with ties and iron five additional miles and obtain $50,000.00 more bonds; and so on until the county bonds are exhausted, and then the company is at liberty to stop. The company is under no obligation to build or operate a railroad or do anything whatsoever that will in any manner benefit or be of use to the county or Territory; but the county is bound to pay, at the option and election of the company, for works utterly useless, works that in their very nature can serve no public end. That this construction of the act is not chimerical, the actual facts in this case bear witness; for the company did lay with ties and iron ten miles of track, ending in the midst of the desert; then abandoned the work, as they were at liberty to do, and never built a railroad nor ran a train (Record, page 23, folio 46). Was this a public use of public funds? Was this a rightful exercise of legislative power?

It is true, that if it be granted that the legislature may compel a municipality to aid in the construction of a railroad, the manner and mode of giving that aid must be left largely to legislative wisdom, and that it is not the province of the courts, once granted that the legislature has the power, to inquire whether the wisdom of the legislature is properly exercised; but it by no means follows that the legislature may, under guise of aid to a railroad company, compel a municipality to squander its money for a purpose not public, a purpose while colorably public is essentially private, a purpose for which not one of the taxpayers burdened—unless he be a recipient of the aid—can hope to receive a benefit.

There is a limit beyond which the legislative may not rightfully go, and it is competent for the courts to ascertain that limit, and if it be found that the legislative has gone beyond it, to declare the act void.

There is no difference between Act No. 35 as it reads in the Session Laws and the following:

The County of Pima is directed and required to issue, without the consent of its taxpayers, $100,000.00 of bonds to the Narrow Gauge Railroad Company in exchange for the company's bonds (that company having no property, real or personal) when that company shall have graded one mile of track into the desert in a northerly direction: *Provided, however,* the said company shall be under no obligation to build any more track nor run any trains over said track, nor use it for any purpose whatsoever; nor shall said company be required to even obtain a right of way for said track from the Government of the United States.

If the legislature may command that bonds shall be issued when five miles of track are laid, so they may when one mile is laid, or half a mile, or one hundred feet; if they may command that $50,000.00 of bonds may be issued, so they may $100,000.00 or $500,000.00; if they may so command, and are omnipotent, then they may command that bonds shall be issued in any amount, without any track, without any railroad, with no public return or use.

The sole ground upon which aid to a railroad company may be either authorized or compelled is that it is for a public use. It is on that ground alone that railroads are given the power of eminent domain. Railroad companies are not public corporations, but private, and operated for private gain; but they are so far public in the use of their property that aid may be given them. This aid is always given to further their public purpose, and not private; the aid is given for the benefit of the public first; the benefit of the company second and merely incidentally. An act, therefore, which compels aid to be given a railroad corporation primarily for

the corporation's benefit as a private corporation, and from which aid the public, under the very terms of the statute providing for the aid, can derive no benefit whatever, is not a disposal of the public funds for a public purpose, but is nothing less than compelling one citizen to pay money to another citizen, masquerading as a railroad company, for the latter's gain and emolument.

What public purpose or use is subserved by building a few miles of track into the wilderness, leading nowhere, ending nowhere; running no trains over it for the transportation of freight or persons, allowing it to fall into ruin and decay? The municipality cannot complete it, nor repair it, nor operate it; it has no such powers. *The one public use of a railroad corporation, that of a carrier, is lacking, and a railroad company which does not carry freight or passengers is in no sense public.*

The money of the people has been put to the use and purpose provided in the act—a use and purpose to aid and enrich the railroad corporation in its private capacity, and not for the benefit of the public, even remotely. We care not what the road cost the railroad corporation a mile to grade; that is not the question. In this instance the track was laid over the level sands and its cost was nominal; but that is unimportant. The question is, May the municipality be forced and compelled to issue bonds and lay taxes for a thing from which, under the very terms of the commanding statute, the public can derive no benefit?

May the legislature of the Territory compel a county to issue bonds to aid a telegraph company, said bonds to be delivered to the company when it shall have sunk one thousand holes in the earth for poles, the company to be at liberty to stop work there, and string no wires, erect no poles, nor transmit messages? Would such legislation be for a public purpose? Would the money be expended for a public use? There is no difference in principle between a railroad company and a telegraph company.

Nor do we desire the principle we are trying to make clear to be confused with a donation. Grant that the legislature may donate money, or compel its donation, it must be for a public purpose. Money may be donated, on this theory, to a railroad company to build and operate a railroad, but not to neither build nor operate one. In the one instance there is a public benefit; in the other none. Nor is the principle we are contending for to be confused with cases of failure, accident, and disaster. If the people vote for aid to a railroad company, or the legislature compel aid to a railroad company, under such guards and protections that a railroad will be built and operated and a public benefit be received, and disaster follow, to be sure the bonds may be valid, for every one, States and municipalities as well as individuals, must assume such risks. But an act which compels, which by its terms coerces, the municipality into doing a thing, which under the very terms of the act, with the act fully and literally complied with, can produce no public good, no benefit, does not fall into this category.

Because a thing is a step toward a public purpose or use does not *ipso facto* make it a public purpose or use, for the step may be so curtailed and abortive that, so far as the public use is concerned, it would be the same as if it had never been taken.

When the contemplated improvement is completed and the public may derive benefit from it, then it may be said that the whole and every part of the improvement is used for public purposes; but when the improvement is incomplete and cannot be used, then no part is as yet of public use. Thus if a charter be given a bridge company to build a bridge, and the company builds but a pier and there stops, it cannot be said that the pier alone constitutes a public use; but when the whole structure is done, then the pier and every part of the bridge is of public use. Under the theory herein granted, for the sake of argument, a municipality might be compelled to aid in the construction of a bridge, under pro-

tection that the bridge be built and made usable; but it could not be compelled to aid in the construction of a pier, which was to be the end of all. For of what public use is a pier, standing in the midst of a stream, and a pier even then which the municipality would not own nor over which it could exercise control? A bridge might be for public use; a pier would only be a useless pile of stones—of profit to those persons who placed it there, and them alone. What we desire to make clear is, that if the high and dangerous power of compelling its inferior divisions to lay taxes to aid private corporations in projecting and operating public uses be given to the State, then that power may only be exercised by the State in such manner as shall conserve and protect the coerced municipality, to the extent at least that the money thus wrung from the taxpayer shall be for a public as distinguished from private purpose, and that the taxpayer shall by the terms of the compulsory act be safeguarded that far; that admitted, that the legislature may command a county to issue bonds and levy taxes for a public use, although owned in private, it may not command the issue of bonds and levy taxes for a purpose which in the eyes of all mankind, the light of history, and human experience can produce no such result. If this be not the law, then indeed the legislative is omnipotent, and tomorrow may compel Pima County to issue $1,000,000.00 of bonds and deliver them to a railroad company when it shall have graded a mile, more or less, into the desert, regardless of the fact that Pima County could by no possibility derive any benefit from the building of that mile.

And Act No. 35 provides no time limit in which the railroad company may grade the various five-mile sections. It may grade, under the act, five miles one year and five miles in five years thereafter; $50,000.00 of the $200,000.00 of bonds called for in the act have not to this day been delivered. If the act be held valid, what assurance has the County of Pima today that the Arizona Narrow Gauge Rail-

road Company may not grade five miles in the desert, and demand the last $50,000.00 of bonds? One section or part of the act is as valid as another, and if the county may be compelled to pay for the first five miles graded, why may it not for the last, as one five-mile section is quite as useful to the public as another?

But if it should be held, in such a case, that the tax is for a public purpose, and not private, then it is equally inhibited, for it is taking private property for a public purpose without compensation, and hence not due process. That law cannot be said to provide for just compensation which compels the issuance of bonds to be paid by the municipality for a thing essentially useless to the public. There is no compensation for the bonds whatsoever. "It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property for public use without just compensation" (Henderson Bridge Company *v.* Henderson City, 173 U. S., 614). Surely, if there may be such a case, it would be where the State compelled a municipality to expend large sums of money for a purpose absolutely without benefit to the municipality.

The principle is clarified by two cases in Kentucky. In Cheany *v.* Hooser, IX B. Monroe, 330—opinion by Marshall, C. J.—the legislature enlarged the boundaries of a town. Part of the land thus included was built upon and in fact used as a part of the town. A citizen who had not consented to the enlargement, and whose house was situate out of the old but in the new town, objected to the payment of the city tax, saying his property was taken for a public use without just compensation. His plea was held untenable, in that he derived adequate compensation in the protection and benefits derived from the town as such. In XV B. Monroe, 492, Covington *v.* Southgate, opinion by the same justice, the legislature had enlarged the boundaries of a town, and had included a large area of farm and agricultural land. The owner of the land refused to pay the city tax, making

the same plea as had the owner in the previous case. Here the learned court draws the distinction in the two cases, saying in effect that in the former case the taxpayer would derive a benefit, but in the latter would not, and that in the latter case no tax could be imposed.

> "But taxation exercised under color of an unnecessary and unreasonable extension procured by the party to be benefited, and against or without the consent of those who are to be taxed, is an oppression against which the Constitution affords a protection to the individual which the courts are bound to enforce."
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> Covington *v.* Southgate, XV B. Mon., 499.

The act is void for the reason that it deprives the taxpayer of his property without due process of law, within the meaning of these words in the Vth Amendment to the Constitution. The property is not taken according to the law of the land, for it is not the law of the land that the legislature may compel a municipality to levy taxes for any but a public purpose. Money is not expended for a public purpose when it is paid to a private corporation to grade a few miles in the desert, and nothing more. That cannot be a public purpose which, from the very nature of the thing done, the public by no possibility can derive benefit. The act is not merely unwise, but it violates the basic principles of private right. It is arbitrary and oppressive; it is an exercise of power the legislature did not, nor does not, possess.

To inquire into and ascertain whether a purpose be public or not in such a case; to inquire into and ascertain whether the rights of the citizen are being abused and violated; to inquire into and ascertain whether the legislature has gone beyond its rightful sphere, and is tyrannizing instead of legislating, is the province of the judiciary.

We know that the Vth Amendment is only a limitation upon Federal power, precisely as the XIVth Amendment is a limitation upon the States. As the Legislature of Arizona

has only those powers, however, which Congress has granted to it; as it acts solely upon delegated power, having no sovereignty of its own, and as Congress, its source of power, is bound by the Vth Amendment, so of necessity must be the Legislature of Arizona. Congress may not delegate a power it does not possess, nor authorize a thing done which it may not do. That the Territories also fall within the limitation imposed upon the States, in many things at least, is unquestionable.

We conclude, therefore, on this branch of the case, that Act No. 35 is void, in that it compels the county to issue bonds for a purpose from which the persons taxed could derive no benefit, public or otherwise; that the thing sought to be compelled by the act was and is "inconsistent with the Constitution and laws of the United States" and not a rightful subject of legislation; that the act being void, so are the bonds.

As to the third point heretofore set out: Act No. 35 is void, because the legislature directed and commanded the county, without its consent, to give and donate $50,000.00 of bonds to a railroad corporation which owned no property and was under no obligation to use the $50,000.00 in the construction of a railroad or for any purpose, but was at liberty to keep the $50,000.00, to refuse to build a railroad or give any consideration for the bonds.

Attention is again directed to Act No. 35, sections 1 and 2. It will be observed that section 1 requires the Board of Supervisors to meet, "and then and there" issue $200,000.00 of Pima County bonds, and deliver them to the treasurer of the county; that section 2 requires the treasurer to deliver $50,000.00 of the bonds to the railroad company upon its application, and the delivery to the treasurer by the company of $50,000.00 of railroad bonds of like tenor and effect as the county bonds.

As to the issuance and delivery of the first $50,000.00 of county bonds, this is the total legislation upon the subject. The railroad company at this time had built not a foot of road nor stuck a pick in the ground (Record, folio 45, page 23). Under the terms of the act, it was not required to build a railroad nor stick a pick in the ground. At this time the railroad company did not own a car, nor an engine—not even a railroad tie. It is set up in the answer, and admitted to be true, that the company owned no property, real or personal. The company was incorporated, and had issued bonds and executed a mortgage, and that was all. Under such circumstances, the county is directed to issue and deliver forthwith $50,000.00 of valuable bonds—for what? Not to aid in the construction of a railroad, for the bonds must be delivered, and no railroad need be built, as in fact it never was; not for anything of value, but for $50,000.00 of bonds of a company—bonds secured by a mortgage on thin air. *The county was commanded to issue and deliver $50,000.00 of bonds for absolutely nothing save and except to aid and enrich those individuals who composed the railroad company.* The county bonds, once issued and delivered to the company, might be used by the company as it saw fit. All the while the company was at liberty not to spend one dollar toward building a railroad or doing anything that would benefit the county; the company—*i. e.*, those individuals composing it—were at liberty to sell the county bonds, pocket the proceeds, and enjoy a continental tour without so much as thinking of Pima County and its interests. The act affords an excellent illustration of legislative highwaymanism—of taking that which is A's and transferring it to B without consent, consideration, or benefit.

> "It is fundamental in the nature of constitutional government, that its powers must be exerted solely for the public use. Only to this extent are the rights of individuals subordinate to the State, and when the State oversteps this limitation and, without regard to benefits to the public, levies a contribution, under the

> form of a tax, upon property of one person for the use of another person or class, it commits an act of confiscation and deprives the individual upon whom the contribution is levied of his property without due process of law. Every lawful tax must then be imposed for a public purpose."
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> McGehee, Due Process of Law, 228.

> "To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."
>
> Loan Association *v.* Topeka, 20 Wall., 655.

It cannot be said that bonds are issued and taxes laid for a public purpose when the bonds are to be delivered to a corporation, to belong to and be the private property of that corporation, the corporation in return to give no consideration or to do anything whatever for the public, for those who must pay the bonds.

Again, the point in discussion should be distinguished from a lawful donation. A donation must be for a public purpose, to have validity. The present donation was for the private use and gain of the stockholders of the railroad company only.

> "It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and hereby is vested in B, would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision."
>
> Justice Miller—Davidson *v.* New Orleans, 96 U. S., 102.

The statute here declares in terms, and *without more,* that Pima County shall deliver its bonds to the company; that the bonds shall then belong to the company, and that the

company shall give nothing or do anything therefor. Courts will look beyond the form to the substance. If bonds issued by a railroad company are so much waste paper, courts will consider them waste paper.

> "Since some early judicial notions of Chief Justice Gibson, no judge or court has intimated that the property of one person could be taken without his consent and transferred to another, either with or without compensation, merely by force of legislative enactment. In whatever form the question may arise, the uniform judgment of the courts of this country has settled that such would be unconstitutional and void legislation. This, then, would seem to be conclusive against the right, by virtue of the act of the legislature, through the machinery of the official agency of Samuel B. Mann, to take the property of the town of Randolph, or of the inhabitants of that town, and put it into his pockets without their consent. Practically that is sought to be done by this suit."
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> Atkins *v.* Town of Randolph, 31 Vt., 234.

> "The Court of Appeals of Kentucky, speaking by Chief Justice Marshall (Cheaney *v.* Hoosier, 9 B. Mon., 330, 345), after observing that there must necessarily be vested in the legislature a wide range of discretion as to the particular subjects or species of property which should be the subject of general or local taxation, as well as to the extent of the territory within which a local tax shall operate, well said: 'There must be a palpable and flagrant departure from equality in the burden as imposed upon the persons or property bound to contribute, *or it must be palpable that persons or their property are subject to a local burden for the benefit of others or for purposes in which they have no interest and to which they are therefore not justly bound to contribute.*'
>
> "The case must be one in which the operation of the power will be at first blush pronounced to be the taking of private property without compensation, and in which it is apparent that the burden is imposed

without any view to the interest of the individual in the objects to be accomplished by it."

Justice Harlan—Henderson Bridge Co. *v.* Henderson City, 173 U. S., 616.

It is only too palpable that the people of Pima County and their property are subjected by sections 1 and 2 of act 35 to a local burden for the benefit of others, to-wit, the shareholders in the Narrow Gauge Railroad Company; and it is quite as palpable (at first blush) that the burden is imposed without any view to the interest of Pima County and its inhabitants. A legislature which commands a county to deliver its bonds to a corporation for that corporation's bonds, well knowing said bonds to be worthless, and no more, can hardly be said to have a view to the county's interest. That a railroad might at some hazy future time be built, provided always that the railroad company might so elect, does not help the matter. Whatever might have been in the legislative mind, it is the act in the statute book that is before the court.

"Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. * * * But there is no rule or principle known to our system under which private property can be taken from one person and transferred to another for the private use and benefit of such other person, whether by general law or by special enactment. The purpose must be public, and must have reference to the needs or conveniences of the public, and no reason of general public policy will be sufficient to validate other transfers when they concern existing vested rights."

Cooley, Con. Lim., pages 506-7, seventh edition.

It does indeed seem idle to discuss this feature of the case further. $50,000.00 of county bonds are directed to be de-

livered to a private corporation for that corporation's sole use and benefit, and without return of any kind—a gift of public funds is made to private individuals to do with as they please. Taxpayer A is bound to pay tax to B for B's private gain; in effect, by mere legislative will, A's property is vested in B.

Under the recognized canon of statutory construction, that part of an act may be void and part valid, if effect may be given to the valid part standing alone, it is only contended here, and on this phase of the case, that so much of Act 35 is void as pertains to the first $50,000.00 of bonds; and therefore, on the third point made,

We conclude that so much of Act 35 as compels the donation of $50,000.00 of bonds to the railroad company, without return of any kind and for a private purpose, is void, and as a consequence the bonds are also void.

And, to sum up the discussion on Act 35, we say:

Act 35 is void,

First, because the legislature had power to authorize counties to issue bonds only for necessary internal improvements, and the building of a railroad was not a necessary internal improvement;

Second, because the legislature directed and commanded the County of Pima to issue bonds in aid of a railroad company, without the consent of the county and without limitation or condition, save as to the first few miles of road, and with no assurance or guaranty that a railroad would ever be built;

Third, because the legislature directed and commanded the county, without its consent, to give and donate $50,000.00 of bonds to a railroad corporation, which owned no property and was under no obligation to use the $50,000.00 in the construction of a railroad or for any public purpose,

but was at liberty to keep the $50,000.00 and refuse to grade a mile of railroad or give any consideration for the bonds. The entire act being void, all done thereunder was void.

Congress in 1896 attempted to validate the Pima County Narrow Gauge Bonds (U. S. Statutes at Large, volume 29, page 262 (Brief, Exhibit "C").)

It is axiomatic that Congress may only do retrospectively that which it might have done in the first place.

The rule is stated by Cooley:

> "But the healing statute must in all cases be confined to validating acts which the legislature might previously have authorized. It cannot make good retrospectively acts or contracts which it had and could have no power to contract or sanction in advance."
>
> Constitutional Limitations, pages 544, 545, 7th edition, 1903.

If Congress, then, in 1883, had power under the Constitution to enact Act No. 35 of the Legislature of Arizona, it might at any subsequent time validate and approve that act and all done thereunder; but if Congress in 1883 had not the power to pass Act No. 35, it could not at any subsequent date validate that act and the things done thereunder. It is, therefore, pertinent to inquire whether in 1883 Congress had the power under the Constitution to enact Act No. 35 of Arizona of 1883.

As to the first point heretofore made, viz., that Act No. 35 was void because of lack of congressional authority, unquestionably, as Congress placed this limitation upon the Territory, and as the bonds were void, for this reason, and as Congress might have granted the authority in 1883 had it so elected, it must inevitably follow that Congress might at any subsequent time remove the restriction and grant the authority. Had the bonds been void merely for lack of authority, however, this case would not now be before the

court. There was more the matter with the bonds than mere lack of authority; the malady lies deeper than that, and the questions presented are:

(*a*) Might Congress compel a county in a Territory to issue bonds, without the consent of the county, to aid a corporation, with no safeguard or limitation that the county would receive for its forced expenditure a public use of any kind whatever, or anything of benefit, or any compensation for its expenditures? and,

(*b*) Has Congress the power to compel a county in a Territory, without its consent, to issue bonds and deliver them to a corporation, the corporation to be under no obligation to give, or do, or perform anything whatsoever for the bonds?

As the argument on the phase of the question in general applies to all the bonds alike, we shall not segregate into a distinct discussion the first lot of $50,000.00, as heretofore, but treat of the entire matter under this head.

This court has often held that in determining what is or is not due process it will look to the substance and not the form.

Chicago, Burlington, etc., *v.* Chicago, 166 U. S., 235.

Act No. 35 directs and commands the supervisors of Pima County to issue $200,000.00 of bonds forthwith and to deliver them to the treasurer of the county; the treasurer shall deliver $50,000.00 of the bonds to the railroad company upon demand and the delivery of a like amount of railroad bonds.

So far as the statute itself goes, on the first lot of bonds, it might here end, and it is purely optional with the company whether it shall proceed to do anything further. If the company shall elect to go further, then the treasurer of the county is commanded to deliver the remainder of the bonds to the company in lots of $50,000.00 each, as five mile sections of road shall be graded and laid with iron. The utmost benefit the county could derive from its $200,000.00 of bonds under the statute was the grading and laying with iron of fifteen miles of track out into the desert.

We will at the outset, and on this phase, state the proposition most strongly against our contention and admit that Congress has the power to compel, without consent, a municipality in a Territory to lay taxes for a quasi-public purpose, and that the actual construction and operation of a railroad is such a purpose. It does not follow, however, that Congress has the power, under the guise of aid to a railroad, to compel a municipality to expend large sums of money for a purpose which may in no manner benefit that municipality.

The first $50,000.00 of bonds were exchanged for $50,000.00 of railroad bonds. This was a completed transaction. When the railroad company had exchanged the bonds for county bonds, it was under no obligation to do or cause to be done anything further. It had given $50,000.00 of its bonds for a like amount of county bonds, and the transaction was closed. It was under no obligation to expend one dollar for railroad purposes. Back of the county bonds was the County of Pima, with hundreds of thousands of dollars of taxable property; back of the railroad bonds was absolutely nothing. It (the company) owned no property, and its few stockholders were under no personal liability. In substance, then, and in actual fact, Pima County was commanded to, and did, give away $50,000.00, together with the accruing interest, amounting to as much more. The inquiry is, therefore, May Congress command a county to give away $100,000—to give, without benefit or consideration? Nor is the question, the power of Congress to compel a donation for a public use or purpose, such as a real railroad, that will transport persons and freight, but the question is, May Congress compel the expenditure of money to be given to a corporation which may not build a railroad or do aught therefor? Such, in effect, are the terms of the act, and under such an act were the bonds issued and delivered.

This is not the expenditure of money for a public purpose; it is an act of spoliation, a command that the people of Pima County shall be taxed in order that the individuals of

a corporation may be benefited. It is the taking of private property—for it comes to that, each citizen of the community being compelled to take from his private store—and the giving of that property to other individuals, to be theirs absolutely, and without return. Had the company to whom the bonds were given been compelled to use the bonds or the money derived from their sale for any purpose that the taxpayer might have reaped a benefit, even remotely, a different question might arise; but an examination of the act shows this was not the case, and that the county bonds, once exchanged, belonged to the company absolutely, and it was bound to do nothing therefor.

Congress may not compel the levying of a tax for a private purpose any more than may a State or territorial legislature; it is hemmed about with the same potent words of the Constitution, although contained in a different section. That the compulsory issuance of bonds, those bonds to be bestowed upon a private corporation, the corporation to give or do nothing therefor, is a taking of private property for private purposes, cannot be gainsaid. Congress could not have passed Act No. 35, and no more can it make valid its provisions at any subsequent day. The act was void in its inception, and there is no power short of an absolute monarchy that can make it effective.

There have been acts overturned by this court where the people taxed would derive some benefit; what of an act where no benefit may be had at all?

In Loan Association *v.* Topeka, 20 Wall., 655, the town of Topeka had issued bonds to aid a manufacturing concern. The works of this company, established in a town, were doubtless of great value to the citizens; but the court held the bonds void, as they were issued to aid a private enterprise.

> "We have referred to this history of the contest over aid to railroads by taxation to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power

in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power and was an unauthorized invasion of private right.

"It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he had placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D; or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. * * *

"To lay with one hand the power of the government on the property of the citizen, and with the

> other to bestow it upon favored individuals to aid private enterprises, and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. * * * We have established, we think beyond cavil, that there can be no lawful tax which is not laid for a public purpose."—*Mr. Justice Miller.*

To lay the hand of taxation upon the people of Pima County, to require and command this people to pay $100,000.00 to a corporation, the money to belong to that corporation absolutely, the corporation to give to, or do nothing of value for, the people, is, as the Justice further says, not taxation at all, but robbery and spoliation. Congress may not do this thing, and when it attempted to validate bonds issued under such an act, it exceeded its power under the Constitution, for it is a taking of property without due process.

A like limitation prevails where the purpose is of a public or quasi-public character, and for a special or particular use, and no benefits of value are to be received by the persons taxed; for it is quite as repugnant to due process to compel the citizen to pay a tax from which he may receive no benefit, even though it may be of a public nature, as it is to require him to pay a tax for a private end. We do not here refer to taxes for government or those uses which settled custom and law have fixed, but to taxes for those things ordinarily outside the affairs of State, such as the building of railroads and the like. And so, referring to the remaining lots of bonds of $50,000.00 each, which were to be exchanged upon the grading and laying with iron of five-mile sections, and nothing more, could the taxpayer receive any benefit for the money forced from his pocket? Under Act No. 35 the taxpayer is not to have the benefit of a railroad, a carrier is not to be given him for the transportation of his person and goods; he is to have graded and laid with iron a five or a ten-mile section into the desert; nothing more. Is this a

benefit for which he may be compelled to expend an immense sum of money?

It is proper, then, to inquire whether due process of law, as contained in the Fifth Amendment, requires some adequate compensation to be given to him who is compelled to give of his property.

In principle there is no difference between taking property directly, by eminent domain, and taking that same property, or a portion of it, indirectly, by taxation. In both it is a taking, and in both the purpose must be public. In one the property itself is taken; in the other a burden is cast upon it. In effect, they are one and the same thing, differing only in method and not in substance.

No doctrine can be more firmly established, both under the common law and the constitution, than that property shall not be taken for public use without just compensation—that is to say, adequate compensation. As laid down by Broom in his work on Constitutional Law, and as quoted by this court in Chicago, Burlington, etc., Railroad *v.* Chicago, 166 U. S., 236, the principle "is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortunes of every citizen" (Page 228, Broom). And this court, in quoting the above, cites numerous authorities.

> "In Fletcher *v.* Peck, 6 Cranch, 87, 135, 136, this court, speaking by Chief Justice Marshall, said: 'It may well be doubted whether the nature of society and of governments does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public be in the nature of legislative power is well worty of serious reflection.'

"In Loan Association *v.* Topeka, 20 Wall., 755, 663, Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the State, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was after all but a despotism, said: 'The theory of our governments, State and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual right, without which the social compact could not exist, and which are respected by all governments entitled to the name.' No court, he said, would hesitate to adjudge void any statute declaring 'the homestead now owned by A should no longer be his, but should henceforth be the property of B.' In accordance with those principles it was held in that case that the property of the citizen could not be taken, under the power of taxation, to promote private objects, and therefore that a statute authorizing a town to issue its bonds in aid of a manufacturing enterprise of individuals was void because the object was a private, not a public one. (See also Cole *v.* La Grange, 113 U. S., 1.)

"In the early case of Gardner *v.* Newburg, 2 Johns. Ch., 162, there being no provision in the constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice, that fair compensation be made to the owner of private property taken for public use. In Sinnickson *v.* Johnson, 17 N. J. Law, 129, 145, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that one was so inseparably connected with the other that they may be said to exist,

not as separate and distinct principles, but as parts of one and the same principle; and that the legislature 'can no more take private property for public use without just compensation than if this restraining principle were incorporated into and made part of its State constitution.' These cases are referred to with approval in Pumpelly *v.* Green Bay Co., 13 Wall., 166, 178; and in Monongahela Nav. Co. *v.* United States, 148 U. S., 312, 325, this court saying in the latter case: 'And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while on the other hand it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.'

"In Searl *v.* School District, 133 U. S., 553, 562, and in Sweet *v.* Rechel, 159 U. S., 380, 398, the court said that it was a condition precedent to the exercise of the power of eminent domain that the statute make provision for reasonable compensation to the owner.

"In Scott *v.* Toledo, 37 Fed. Rep., 385, 395, 396, the late Mr. Justice Jackson, while circuit judge, had occasion to consider this question. After full consideration, that able judge said: 'Whatever may have been the power of the States on this subject prior to the adoption of the Fourteenth Amendment to the Constitution, it seems clear that since that amendment went into effect such limitations and restraints have been placed upon their power in dealing with individual rights that the States cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, and that any attempt so to do, whether done in pursuance of a constitutional provision or legislative enactment, whether done by the legislature itself or under delegated authority by one of the subordinate agencies of the State, and whether done directly by taking the property of one person and vesting it in another or the public, or indirectly through the forms

> of law, by appropriating the property and requiring the owner thereof to compensate himself, or to refund to another the compensation to which he is entitled, would be wanting in that "due process of law" required by said amendment. The conclusion of the court on this question is that since the adoption of the Fourteenth Amendment, compensation for private property taken for public uses constitutes an essential element in "due process of law," and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution.' To the same effect are Henderson *v.* Central Passenger Railway, 21 Fed. Rep., 358, and Baker *v.* Norwood, 74 Fed. Rep., 997."
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> Mr. Justice Harlan in Chicago, etc., *v.* Chicago, 166 U. S., 236, 238, 239.

If, then, it be settled law that private property may only be taken directly for a public purpose and upon just compensation, will not precisely the same reasoning sustain the proposition that private property may only be taken for a public use, and upon just compensation, when the property is taken indirectly by taxation? There can be no difference in the two matters. As heretofore stated, they are identical in substance, differing only in form and method; and the compulsion of an issue of bonds necessarily includes the compulsion of a tax to pay the bonds.

The principle in this application is not new, and has been maintained by *many* courts. There must be adequate and just compensation for taxes laid for special purposes; there must be substantial benefits conferred and received.

Cheaney *v.* Hooser, 9 B. Monroe, 330.
Covington *v.* Southgate, 15 *Id.*, 491.
Morford *v.* Unger, 8 Iowa, 82.
Langworthy *v.* Dubuque, 13 Iowa, 86.
Kulton *v.* Davenport, 17 Iowa, 404.
Bradshaw *v.* Omaha, 1 Neb., 16.
Kelly *v.* Pittsburg, 85 Pa. St., 180.

Chief Justice Agnew, in his dissenting opinion in Kelly *v.* Pittsburg, *supra,* strikes the very root of the matter, and that is: there must be benefits, substantial benefits, from the levying of the tax, else the tax is void as not being in due process. It would be the taking of something of value from the citizen and giving him nothing in return.

The question, whether or not a legislative act compelling an issue of bonds and the levying a tax for a special purpose, such as aid to a railroad corporation, provides for substantial benefits to the taxpayer, is judicial and not legislative. It is for courts to say what is due process.

Act No. 35 commands, and, by attempting to validate the bonds, Congress by act of June 6, 1896, also commands, that $200,000.00, with interest amounting to as much more, shall be paid by Pima County, by taxation, to a corporation for grading and laying with iron fifteen miles of road into the desert, the work when done to belong to the corporation. Is there in this any benefit, any compensation, to the taxed citizens? They shall pay $400,000.00 for what? That a right of way in the desert may be graded for fifteen miles and laid with iron. There is nothing else. The grade made and iron laid, the matter is at an end.

The motive which actuated the legislature is immaterial. As Cooley says in the Detroit Park case, "bad motives cannot render a constitutional law invalid, neither can good motives legislate usurpation." It is the act on the statute book that is to be construed.

The naked statement of the provisions of the act is sufficient to shock the conscience of a just man. As well say to the citizens of Pima County, "You shall each pay $50.00 to a corporation that it may go into the desert and shovel sand, and make a profit therefrom. The shoveling of sand is a thing utterly useless and from which you can derive no benefit, but you must pay anyhow." Can it be seriously contended that any community may receive benefit from a grade and some iron thereon laid? Could a thing be more utterly

useless than this? Yet this is the whole act; and for this grade and this iron the bonds were issued. The act was obeyed, and the obedience only the more emphatically shows the enormity of it. Had some consideration for the rights of the taxpayer been shown; had some safeguard been thrown about the matter; had a railroad, however insignificant, been provided for, a different question might arise. It was an arbitrary act, commanding unequivocally the payment of so much money for a thing without benefit, without return, and nothing else can be made of it.

As stated in an earlier part of this brief, if Congress may validate bonds issued under a mandatory statute for nothing of benefit to the person taxed, then it may compel the issuance of bonds to any amount, for any purpose that it may see fit.

The act of June 6, 1896, attempting to validate bonds, issued under compulsion to a private corporation for its private gain, and nothing more, and for nothing of value or benefit to the municipality taxed, is a taking of property without due process, under the Constitution, and is void.

Fourth Specification of Error.

The court erred in holding that said act of June 6, 1896, did or could validate said bonds for the reason that Congress had no power to validate bonds issued under Act No. 35, Laws of 1883, in this: That when said act of Congress was passed, in 1896, no railroad had ever been built, nor a passenger carried, nor a pound of freight transported, and that even the place where the grade had been had disappeared; that the Pima County Narrow Gauge Bonds had been declared absolutely void by this court in 1894, and that the people of Pima county were under no moral obligation to pay said bonds, and that the act of Congress of 1896 was a judicial decree to the effect that the bonds should be paid,

regardless of the fact that Pima County had received no consideration therefor.

Prior to the passage of the act of Congress of June, 1896, the following conditions existed:

1. Act No. 35, Laws of Arizona, 1883, was void. It was void *in toto* for the first and second reasons, and in part for the third reason hereinbefore pointed out. There was no authority for the issuance of the bonds and they were void.

2. No railroad had been built or operated, and the ten miles of track graded had fallen into ruin. Even the elevation or grade on the right of way had disappeared. There was no railroad or other work of a public character, and never would be one, and yet Act No. 35 had been literally complied with.

At this time, therefore, there were no bonds, and there was no track or railroad. All of the parties interested, *i. e.*, the County of Pima and the holders of the bonds, were legally and morally in the same position as if Act No. 35 had not been passed nor the bonds issued.

With matters in this condition, the Legislature of Arizona memorialized Congress to validate bonds, the validity of which had been recognized by the payment of interest (Record, folio 87). The Pima County bonds were not within the purview of the memorial and were not asked to be validated, for no interest had been paid thereon. Congress went beyond the request of the memorialists and attempted to validate all bonds.

The Constitution was extended over the Territory of Arizona in 1863 (c. 56, s. 2, v. 12, p. 655; sec. 1891, R. S. of U. S., 1875), and Congress occupies the position of a State legislature to the Territory, subject to the Constitution (Utter *v.* Franklin, 172 U. S., 423).

The essential features of act of Congress June 6, 1896, 29 Stat., 262, c. 339, are these: Certain acts, not here in question, "are hereby amended and extended so as to authorize the funding of all outstanding obligations of said

Territory, and the counties, municipalities and school districts thereof, as provided in act of Congress approved June 25, 1890, until January 1, 1897, and all outstanding bonds, warrants, and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by legislative enactment of said Territory, bearing a higher rate of interest than is authorized by the aforesaid funding act, approved June 25, 1890, and which said bonds, warrants, and other evidences of indebtedness have been sold or exchanged in good faith, in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds, as provided by this act.

> "SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the Loan Commission of Arizona under the provisions of the act of Congress approved June 35, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved, and validated, and may be funded as in this act provided until January 1, 1897."

It is conceded that the terms of the act cover and include the Pima County Narrow Gauge bonds issued under authority of Act No. 35, Laws of 1883; that the bonds were presented for funding prior to January 1, 1897, and were thereafter funded by the Territory under the mandate of this court in the case of Murphy *v.* Utter, 186 U. S., 95.

It is unquestioned, that where a local debt has been incurred for a purpose which is in itself public, and germane to the purposes for which the taxing district or government

exists, but the proceedings are void because the legislature has not authorized them, or because the municipality has gone beyond the statutory authority, or because there was some irregularity in the steps taken, that the legislature, Federal or State, may by a curative act validate the proceedings, because and for the reason that the legislature, in the first place, might have conferred the power or jurisdiction. It was thought, and is still maintained in some quarters, that this power to cure was confined to really curing something then in existence—that is, to remedying irregularities; but the doctrine has been extended to curing and making valid things utterly void.

It was upon this theory, and this alone, that this court, in the case of Utter *v.* Franklin, 172 U. S., 416, held that Congress had the power to validate the bonds. The court say:

> "*Their only defect* was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify."

It is now respectfully urged that this was not the only defect in the bonds. It was unfortunate the whole case was not presented to the court at the time; but that was not Pima County's lawsuit, nor should she suffer for the neglect of others. The above decision, with others, will be discussed hereafter.

The basis and fabric upon which the principle of validation rests is that of equity and right. It is the moral obligation, as distinguished from the legal, that gives the legislature the power to act. Its purpose is to further the ends of justice, and compel men to do that which they have agreed to do and which in good conscience they should do. It removes the legal obstacles from the path of justice. But take

away the moral obligation, eliminate the equities, and there is nothing upon which the legislature may take hold. It is quite beyond the power of the legislative to bind him who is neither legally nor morally bound.

> "So he who was never bound, either legally or equitably, cannot have a demand created against him by mere legislative enactment."
>
> Cooley, Con. Limitations, p. 528, 7th edition.

Pima County was never legally bound to pay the bonds; that this court has decided in Lewis *v.* Pima County, 155 U. S., 54. The bonds were void. At the time of the passage of the act of June 6, 1896, was Pima County morally or equitably bound?

Consider the situation. In 1883 the legislature had enacted an imperative, mandatory statute compelling the county, first, to give away $50,000.00 of bonds for no other consideration or return than a parcel of worthless paper, neither more nor less. Nothing was to be done for the county in return for the bonds, of either a public or private character. It was an outright gift to individuals, to do with what they pleased, and without obligation or promise. Second, the county was commanded to deliver $50,000.00 of bonds when five miles of track was laid, and $50,000.00 more when ten miles of track was laid, and a like amount when fifteen miles of track was laid. This was the sum total of all; no railroad need be built or operated. There was no consent or approval by those who were to pay the money. The first $50,000.00 of bonds were given away, and the second and third lots of like amount were exchanged, and ten miles of track was laid.

Here again we have the sum total of all. No more track was built; that which was built fell into ruin; the rails were torn up and sold for old iron; no trains were ever run. Pima County always repudiated the bonds. Under such circumstances can it be said there was a moral obligation? An

obligation for what? The county had received nothing. May a moral or equitable obligation exist when nothing whatever of value has been received? Is there not here, eliminating the compulsory part of the act, an entire failure of consideration? Suppose the people had actually consented to the issuance of bonds to aid a public purpose, such as the actual, *bona fide* building of a railroad, and the bonds were void because of lack of authority to issue them, and no railroad has ever been built, could it be said there was a moral obligation to pay the bonds? For what should they be morally obligated? They have received nothing; in law nor in good conscience, do they owe anything?

The case in this respect is similar to that of an individual under a disability to contract who executes a note, payable in ten years, in consideration of things to be done. The things are not done. In law nor in morals does an obligation to exist, nor does it lie in the power of anybody whatever to declare that an obligation does exist. Such legislation would not be legislation at all, but an arbitrary decree, which could only be enforced by might.

This precise state of affairs existed when Congress passed the act of June, 1896. The bonds were void. There was no track, no railroad; there never had been, nor ever would be anything whatever that the county and its people might derive benefit from, either public or private. There was no legal or moral obligation. Bonds had been issued, but they were void; a railroad had been projected, but it had never been built. In such a situation an act of Congress attempting to give life and vitality to the bonds, and not requiring anything to be done therefor, is equivalent to a decree that the County of Pima shall pay upwards of $300,000.00 for absolutely nothing. If such a power exists, it may be exerted prospectively as well as retrospectively, and Congress may decree that the County of Pima shall pay $300,000.00 to whomsoever Congress may nominate, and for absolutely nothing in return. *We repeat, that if Congress have the*

power to declare void obligations valid, and to require their payment by a municipality when that municipality has received nothing of value or benefit for the bonds, then it may require the municipality, out of hand, to pay the same sum in future for nothing of value or benefit.

Such is not the law, and this court and others have recognized the principle we are contending for, and it is this: Where bonds or obligations have been issued, but are void for lack of legislative power, but there is a moral obligation on the part of those executing the bonds to pay them, having received value therefor, then the legislature, because of this moral obligation, may remove the legal obstacles and validate the obligations, and not otherwise.

All sound law must be rooted in the soil of justice. Legislatures and Congresses are not supreme; they are hemmed about with fundamental limitations, which it is the duty and glory of courts to declare. The legislative may legislate, but it may not decree; it may recognize a moral right and make it enforceable at law, but it may not make that enforceable which is without equity, extreme, and arbitrary. It may not validate $50,000.00 of bonds issued under compulsion, not for a public purpose, and for which nothing was received; it may not validate $100,000.00 of bonds issued under compulsion, and for which not one thing of value or benefit has been received, nor ever will be. Unless the moral obligation to pay exists, the legislature is powerless.

In October, 1877, this court decided New Orleans *v.* Clarke. 95 U. S., 644. Here bonds had been irregularly issued, and the legislature had validated them, and one of the questions in the case was whether it was competent for the legislature to legalize the bonds. Justice Field says:

> "Assuming, then, that the bonds were invalid for the omission stated, they still represent an equitable claim against the city. They were issued for work done in its interest, of a nature which the city required for the convenience of its citizens, and which

its charter authorized. It was therefore competent for the legislature to interfere and impose the payment of the claim upon the city. The books are full of cases where claims, just in themselves, but which, from some irregularity or omission in the proceedings by which they were created, could not be enforced in the courts of law, have been thus recognized and their payment secured. The power of the legislature to require the payment of a claim for which an equivalent has been received, and from which the city can only escape on technical grounds, would seem to be clear. Instances will readily occur to every one where great wrong and injustice would be done if provision could not be made for claims of this character. For example, services of the highest importance and benefit to a city may be rendered in defending it, perhaps, against illegal and extortionate demands; or moneys may be advanced in unexpected emergencies to meet, possibly the interest, on its securities when its means have been suddenly cut off, without the previous legislative or municipal sanction required to give the parties rendering the services or advancing the moneys a legal claim against the city. There would be a great defect in the power of the legislature if it could not in such cases require payment for the services, or a reimbursement of the moneys and the raising of the necessary means by taxation for that purpose. A very different question would be presented, if the attempt were made to apply the means raised to the payment of claims for which no consideration had been received by the city."

Here, then, is the principle: Where a municipality has incurred obligations, but the obligations are void for lack of power, or irregularities, and the municipality has received the equivalent in value for the obligations, then the obligations may be legalized, and the municipality made to pay. The basis, the underlying ground, is the existence of the moral obligation, and this in turn is grounded upon benefits received. If this be lacking, if the municipality have not received the equivalent, nor aught of value, a very different

question is presented, for if no moral or legal obligation exists, an act of validation would be the creation of an obligation, and its imposition would be the taking of property arbitrarily, without consent or consideration.

Again, in 1882, in Read *v.* Plattsmouth, 107 U. S., 575, this court, speaking by Mr. Justice Matthews, says:

> "The act in question, so far as it relates to the bonds in suit, does not confer any corporate power upon the city in the sense of the constitution of the State. The statute operates upon the transaction itself, which had already previously been consummated, and seeks to give it a character and effect different in its legal aspect upon that which it had when it was *in fieri*. Whether such an effect may be given by a legitimate exercise of legislative power depends upon those considerations which draw the line beyond which retroactive laws cannot pass, and is not affected by the supposed form of the enactment as a special or general act conferring corporate power. For it operates upon the rights of the parties as determined by the equity of their circumstances and relations, and gives to them the sanction derived from subsequent confirmation, by clothing them with forms which are essential to their enforcement, but not to their existence. Within the usual limitations prescribed by our written constitutions, such as have been quoted from that of Nebraska, this may be done, provided it can be done without the destruction of rights recognized by the law as vested.
>
> "In the present case the statute in question does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and consideration. On the contrary, upon the supposition that the bonds issued, as to the excess over $15,000, were void, because unauthorized, the city of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a school-house on property the title to which is confirmed to it by the very statute now claimed to be unconstitutional, and an obligation to restore the value thus received, kept, and used immediately arose. This obligation, ac-

cording to general principles of law accepted in Nebraska, was capable of judicial enforcement" (Clarke *v.* Saline County, 9 Neb., 516; Louisiana *v.* Wood, 102 U. S., 294; New Orleans *v.* Clarke, 95 *Id.*, 644; Hitchcock *v.* Galveston, 96 *Id.*, 341; Parkersburg *v.* Brown, 106 *Id.*, 487; Chapman *v.* County of Douglas, *ante*, 107 U. S., 348, p. 348).

"As was said by Mr. Justice Field in New Orleans *v.* Clarke: 'A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the State, or of any of its subordinate agents, with respect to past transactions' (p. 654)."

The obligation *existed*, and all the legislature did was to recognize the existing moral obligation and make it legally enforceable. There was no attempt to *create* the moral obligation. As the Justice further says in the case last quoted:

"As the city of Plattsmouth was bound, by force of the transaction, to repay to the purchaser of its void bonds the consideration received and used by it, or a legal equivalent, the statute which recognized the existence of that obligation, and by confirming the bonds," etc., etc.

In Guthrie National Bank *v.* Guthrie, 173 U. S., 537, Mr. Justice Peckham, speaking for the court, says:

"In Read *v.* Plattsmouth, 107 U. S., 568, the words of Mr. Justice Field in New Orleans *v.* Clarke, 95 U. S., 644, were quoted with approval. In the exercise of this jurisdiction over municipal corporations by the State or by the territorial legislature, no constitutional principle is violated. It is a jurisdiction which has been customarily exercised ever since the

> foundation of the Government, and is based upon the power of the State as sovereign, to itself recognize or to compel any of its political subdivisions to recognize those obligations which, while not cognizable in any court of law, are yet based upon considerations so thoroughly equitable and moral as to deserve and compel legislative recognition."

And so in town of Duanesburgh *v.* Jenkins, 57 N. Y., 177, where bonds had been validated by the legislature, we find the court saying:

> "The action of the legislature is, in my judgment, sufficient to heal this defect, and to sanction the action of the town commissioner in binding the town, the whole consideration to the town having been received in the completion of the road and the issuing of the stock for its benefit."

This language is quoted with approval in Thompson *v.* Perrine, 103 U. S., 815. The principle is found in many cases, and it will be seen that wherever void bonds have been validated and the validation upheld by the courts, that in every instance there has been a moral obligation to pay, a consideration of value received. In other words, the equities have been with the holders of the bonds. As said by Mr. Chief Justice Waite in Louisiana *v.* Wood, 102 U. S., 299:

> "The obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

And if in justness a county may not keep money obtained without authority of law, having given nothing therefor, will not the same justness demand that when the county has, under compulsion, issued obligations without authority of law, and received nothing therefor, nor ever will receive any-

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thing, that it should not be compelled to pay those obligations? It is a poor rule that does not work both ways.

Springfield Safe-Deposit Company *v.* Allica, C. C. of A., 85 Fed., 391.

Gilmore *v.* Norton, 10 Kan., 492-505.

A law which attempts to validate obligations, whether they be of natural or artificial persons, where no moral or legal obligation exists, is void, not because of lack of power to pass validating acts, but because such an act is not a validating act at all, but the creation then, for the first time, of obligations never before in existence. It is the imposition of debt by mere legislative will, without consent or consideration; it is the taking, arbitrarily, of A's property and giving it to B. Such an act is the taking of property without due process of law and under the Constitution is a nullity. It is a legislative judgment that A shall pay to B money for which A is neither morally nor legally bound.

The act of June 6, 1896, does precisely this thing: Pima County's bonds were legally void. There was, then, no legal obligation to pay. The first $50,000.00 of bonds were given outright, under a mandatory act, for nothing of value. The remaining $100,000.00 were exchanged, also under a compulsory act, for bonds of a company which had graded ten miles out into the desert, and nothing else. Even this grade had disappeared at the date of attempted validation. Can it be said, under such circumstances, that a moral obligation existed? *Not one single dollar of benefit had the county received.* Had the county been a natural person, would any just man say there was a moral obligation to pay anything?

The language of Mr. Chief Justice Waite in Katzenberger *v.* Aberdeen, 121 U. S., 178, is also applicable:

> "The bonds in the present case, when issued, were unauthorized and void, so that the only question is whether the curative statute has made them good. The objection to them is not that they were issued irregularly, but that there was no power to issue them

> at all. They are to be made good, if at all, not by waiving irregularities in the execution of an old power, but by the creation of a new one. Clearly, therefore, if the legislature had no constitutional authority to grant the new power, a statute passed for that purpose could not have the effect of validating the old bonds."

The Pima County bonds were void; the county had received nothing therefor, and never would or could. The act of June, 1896, attempts, for the first time, to give the bonds life and vitality. The act creates the obligation of the bonds, for this obligation never before had existence. This obligation is created at a time when the county has received nothing, and when it can receive nothing in the future. The act decrees, therefore, that the County of Pima shall pay upwards of $300,000.00 for absolutely nothing. It is equivalent to a decree out of hand, a decree made today, that the County of Pima shall pay a large sum of money to certain persons who have no claim upon the county and who are to do nothing for it and who have done nothing for it.

The last paragraph is but a different method of expressing the principle before laid down, that the legislature may not create obligations where none before existed, but that it may only recognize existing obligations, equitable and just within themselves, and remove legal obstacles from their enforcement.

The act of June 6, 1896, disturbs vested rights, is repugnant to the provisions of the Constitution heretofore cited, and, in so far as it attempts to validate the Pima Narrow Gauge Bonds, is void.

Fifth Specification of Error.

The court erred in holding that the act of Congress of June 6, 1896, attempted to or did validate the said Pima County Narrow Guage bonds issued in compliance with Act No. 35, Laws of the Territory of Arizona of 1883.

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This specification of error has been argued under the third and fourth specifications of error.

SIXTH SPECIFICATION OF ERROR.

The court erred in holding that the decisions of the Supreme Court of the United States in the cases of Utter *v.* Franklin and Murphy *v.* Utter were *res judicata* or *stare decisis* upon the defendants in this action, in this: That in neither of the cases last mentioned did this court pass upon or have presented to it the question of the constitutionality of Act No. 35, Legislature of Arizona, 1883, nor the act of Congress of June 6, 1896, and that the points and questions now presented were not agitated, considered, or decided in said cases, and that the doctrine of *stare decisis* or *res judicata* cannot be invoked where for the first time in the history of litigation the constitutionality of legislative acts are called in question.

The Supreme Court of Arizona felt bound upon all points raised in this case, save one, by the rule of *stare decisis*, that one being the compulsory character of the act. The rule was held applicable not by reason of the former decisions of the Arizona Court, but because of the decisions of this court, and evidently the decisions in the mind of the court were Utter *v.* Franklin and Murphy *v.* Utter, *supra*. We believe, with the greatest respect for the Arizona court, that it quite misconceived the meaning of *stare decisis* and the effects of the rule.

Mr. Justice Field, when a member of the Supreme Court of California, in Hart *v.* Burnett, 15 Cal., 598, in speaking of this matter, said:

> "It is important to ascertain with precision of what descriptions of adjudications this doctrine is predicated. A decision is not even authority except upon the point actually passed upon by the court and directly involved in the case. But even then the mere reasoning of the court is not authority. The point decided by the court, and which the reasoning illustrates and explains, constitutes a judicial precedent."

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And then the Justice quotes the language of Marshall, in Cohens *v.* Virginia, already quoted in this brief, and many authorities, the decision being most valuable.

Not only must the point have been adjudicated, but it would appear that the precise point must have been agitated. By this we mean: That if it appear that the court should not have had presented to it a certain precise point in the earlier case, but such is presented in the case in being, the former case is not *stare decisis.*

> "In conclusion, it has been urged against the judgment we have formed in favor of the right of the defendant, that several actions have been tried in Maine, where his interests have been brought in question as to the premises, and decisions had against him; and that such local adjudications in respect to the titles to real estate should control the opinions of this court (9 Cranch, 87; 2 Wheat., 316; 10 *Id.,* 152; 12 *Id.,* 153; 2 Gal., 105). But on examining the particulars of the cases cited to govern this (3 Kan., 398; 4 Shep., 84, 88; 14 Me., 51), it will be seen that the construction of the mortgage to the college, in respect to this reservation or condition, never appears to have been agitated. If it had been, the decision would be entitled to high respect," etc.
>
> Foxcroft *v.* Mallett, 4 How., 355.

So, if an act be before a court for construction and the court construe it, this decision would not be *stare decisis,* if the same matter, between the same parties even, were to come before the court again, and for the first time the question of the validity of the act, under the Constitution, be raised. The first decision might be sound law, for the court is only construing the statute, and saying what it means, all the while treating it as a valid act; but such a decision, when the question of the validity of that act is raised, would be of no controlling power, for the court has not passed on that matter, and so this court has held.

> "It is true that in a former case against the same defendant, upon an indictment of a similar kind,

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for a previous offense of setting up and carrying on a lottery, the Supreme Court of the State held that the statute in question constituted a contract, and that the repealing act was for that reason void. But in that case the only subject before the court was the meaning of the statute—whether its provisions in their terms amounted to a contract which a subsequent enactment could not impair. The constitutionality of the act was not drawn in question; that was not denied.

"Courts seldom undertake, in any case, to pass upon the validity of legislation where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then they will construe the acts presented for consideration, define their meaning, and enforce the provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. Previous adjudications upon other points do not operate as an estoppel against the parties in new cases, nor conclude the court upon the constitutionality of the acts, because that point might have been raised and determined in the first instance. So when, in the present case, the point was taken for the first time against the constitutionality of the act of 1868, the court was not precluded by the previous decisions from freely considering and determining it. Having considered it, the court came to the conclusion that the act could not be sustained."

Mr. Justice Field—Boyd *v.* Alabama, 94 U. S., 648.

Boyd *v.* Alabama was a criminal case, but the principle announced is equally applicable to a civil one. The Supreme Court of Mississippi, in Adams *v.* Yazoo & M. V. R. Co., 24 South. Rep., 217, say:

"There are some primary rules on the subject of *stare decisis* to which we shall first call attention. They are formulated by the Supreme Court of the United States as follows:

"(1) 'The court is not bound by expressions in

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former decisions on points which were not contested (Cross *v.* Burke, 146 U. S., 86).

"(2) '* * * * * * * *

"(3) 'It is expressly held that a decision that a statute constitutes a contract and that an act repealing it is void is not an estoppel to a subsequent decision holding that the former statute itself is unconstitutional, and this is the exact case now before us' (Boyd *v.* Alabama, 94 U. S., 645)."

In this case, which is a civil one, the court treats the case as authoritative. And so did the Court of Errors and Appeals of New Jersey in Water Com'rs of City of New Brunswick *v.* Cramer, 61 N. J. L., 270:

"In Boyd *v.* Alabama, 94 U. S., 645, the Supreme Court of the United States held that *res judicata* would not preclude inquiry into the constitutionality of a statute interpreted as if valid in a former cause between the same parties, and held to make a contract between the State and the defendants on facts proved in both causes. The case is not decisive, for it was an indictment, but the principle is plainly declared. In Commissioners *v.* League, 129 U. S., 493, the same court looked through a judgment, formed on coupons, to the statute under which the bonds were issued, and, finding it invalid, refused a mandamus to raise a tax to pay the coupons, although merged in the judgment. The judgment stood as such, but was held not to bar an inquiry into the law.

"The doctrine that the estoppel of a judgment is conclusive on the facts but not on the law is approved by Mr. Bigelow in his work on Estoppel (5th ed., p. 100). In this State a close precedent to the case in hand has stood unquestioned since 1859. It is the decision of the Supreme Court in Bernard *v.* Mayor, etc., of Hoboken, 27 N. J. Law, 412. The situation was this: The city under its charter had, by an ordinance that was claimed to make a contract, established a police force for two years, with the plaintiff as a member. After his discharge on the disbanding of the force at the end of a half year, he brought suit and recovered the equivalent of his compensation up

> to the time of the bringing of the suit. In a later suit for compensation for the residue of the term, it was held that the former judgment did not estop the defense; that, as the plaintiff was a public officer, he was subject to discharge, notwithstanding an employment by contract for a fixed term. The decision was put on the ground that this question of law was not concluded by the former judgment."

Also, in Webb *v.* Lafayette County, 67 Mo., 368-9, in a civil action relating to township bonds, the court say:

> "* * * We have the authority of the Supreme Court of the United States in the case of Boyd *v.* State of Alabama, 94 U. S., 648, in saying that we are not precluded from a full consideration of the subject. The court in that case held that"—(the language of the court heretofore quoted in this brief being there quoted).

What, then, was decided by the cases of Utter *v.* Franklin and Murphy *v.* Utter? And was the constitutionality of Act No. 35 of Arizona, or the act of June 6, 1896, of Congress raised in either?

Utter *v.* Franklin, 172 U. S., 416, was a mandamus proceeding to compel the Loan Commission of Arizona to fund the Pima County bonds into territorial funding bonds. The defense was that this court, in Lewis *v.* Pima County, 155 U. S., 54, had declared the county bonds void. This one matter was the issue: Whether Lewis *v.* Pima County was *res judicata*. The court reviewed the legislation of both the Territory and Congress pertaining to the subject, and, finding that the validating act of Congress of 1896 was enacted subsequent to the decision of the Lewis case, held the doctrine of *res judicata* did not apply; and, this being the only defense, the case was sent back to the Arizona court for further proceedings not inconsistent with the opinion.

Such was the case and such the one point at issue. The

court, however, states that it was within the power of Congress to validate the bonds, saying:

> "Their [the bonds] only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railroads, and that which Congress could have originally authorized it might subsequently confirm and ratify."

The question of the validity, under the Constitution, of the act of Arizona and of Congress was not presented, considered, or adjudicated.

Murphy *v.* Utter, 186 U. S., 95, is but a continuation of Utter *v.* Franklin. The latter case was sent back to the Arizona court and new defenses were interposed. Upon appeal the court says:

> "Of the numerous defenses upon the merits set up in the amended return, but two are pressed upon our attention, namely, whether the petition abated by a change of the personnel of the loan commission or by a repeal of the act abolishing [creating] the commission altogether."
>
> Murphy *v.* Utter, *supra.*

The court held the petition did not abate by a change of personnel of the commission, and that the Legislature of Arizona could not repeal the act creating the loan commission, as it was an act of Congress. Here, again, are the only points in issue, and the only points decided, and here, as before, the question of the validity under the Constitution of the acts of Arizona and Congress was not presented, considered, or adjudicated.

And, regardless of precedents and that which has gone before, it would indeed be hard to bind Pima County and hold her estopped in a matter of vital interest and which heretofore she has had no opportunity to defend. This is the

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first time the county, as such, has had occasion to present her defenses since the decision in Lewis *v.* Pima County.

Nor should the fact that the Loan Commission of the Territory, under the mandate of this court, funded the county bonds into territorial bonds weigh in the balance, nor the fact that the territorial bonds are outstanding. The great question is now for the first time presented, Has the legislature overstepped its legitimate bounds? Are the acts under which the bonds were issued and validated void? If these acts are void, they should be declared void, for we take the highest plane of the old maxim—a maxim more powerful, as it is more righteous, than *stare decisis*—"Let justice be done though the heavens fall." This respondent, now for the first time since the act of Congress attempted to validate the bonds, comes clean-handed and free from entangling decisions, and asks to be relieved from an obligation which she does not owe, morally or legally. And in this behalf the language of the Supreme Court of Missouri in Webb *v.* Lafayette County, 67 Mo., 369, 370, is applicable.

> "It is also urged that the bonds have been issued, placed on the market, and have passed into the hands of innocent purchasers, and should therefore be upheld. While bonds of the character involved in this suit have been put on the footing of commercial paper, we aprehend no well-considered case can be found which asserts that a bond issued under a law absolutely null and void will be enforced by the courts in the hands of anybody. A purchaser of such bond takes it charged with notice of a total want of power to issue it, and if issued under an unconstitutional law, it is void into whosoever hands it may come (Cooley's Con. Lim., 188 and 215; Dill., Mun. Corp., Lec. 108, page 228; County of Dallas *v.* McKenzie, 94 U. S., 660). While loss to the holder of a bond issued under a void law would necessarily result, it should not be forgotten that to enforce the payment of such bonds by striking down the organic law would inflict a severe blow on good government and entail a greater loss on the community at large than mere

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> pecuniary sacrifice. While it is the duty of courts to employ all the appliances and agencies provided for that purpose; to compel the payment of all obligations which are recognized as legal, it is equally their duty to prevent the use of any of them in the enforcement of any obligations which are illegal and void. While it would be unjust not to give force and effect to a valid contract, it would be equally unjust to give effect to a contract which the law pronounces void, either because not allowed or forbidden to be made."

An act is to be adjudged constitutional or unconstitutional not by that which is done under it, but by the terms of the act itself.

The Supreme Court of Arizona held that Act No. 35 and the confirming act of Congress may not have been valid, but that nevertheless, as the county did issue the bonds, the territorial act and the congressional act constituted sufficient authority for their issuance, and they were valid. In other words, it was declared that the law as enacted by the legislative might be void; but that if it be acted upon, then it is valid; that is to say, it lay with the County of Pima as to whether or not the legislative acts were valid.

It is hardly necessary to cite authorities to show that acts are to be adjudged good or bad, not by that which is done under them, but by the criterion of the power of the legislative. If the act be a legitimate exercise of legislative power, it is valid, whether acted upon or not; and if the act be beyond that power, it is void, whether acted upon or not.

Thus, if an act be passed for special assessments in municipalities, and does not provide for notice to the taxpayer at some stage of the proceedings, the act is void, regardless of the fact that actual notice was given. Mr. Hare, in his work on Constitutional Law, vol. 1, page 316, in discussing Stuart *v.* Palmer, 74 N. Y., 183, says:

> "The constitutionality of a statute depended, not upon what was done under it, but on what it provided for or allowed."

In the nature of things, such must be the case, for the sole power to legislate lies with the legislative, and the act, as it leaves their hands must be good or bad from a constitutional viewpoint.

The questions before the Supreme Court of Arizona and the questions now before this court are not of authority to issue the bonds—although in this matter it is denied that any legislative power, territorial or congressional, could even authorize bonds to be given by a municipality for nothing whatever of value and to aid private purposes, or for purposes from which the public taxed could not derive a benefit, for authorization to do a void thing would not render the matter any the less void—but the questions are the power of the legislative to enact a compulsory statute which by its terms requires a municipality to donate bonds to a corporation which is not required to do or return anything of value for these bonds, of either a private or public nature; and the power of the legislative to require a municipality to issue bonds and deliver them to a corporation for the doing of a thing utterly useless and purposeless, and from the doing of which the citizens taxed cannot receive any benefit; an act which, with the terms fully complied with in this respect, provides no return to the taxpayer for his tax; and, further, the power of Congress to validate void bonds and make them for the first time living obligations, when nothing of value has been received for them by the taxed and nothing can be received; to compel the payment of the bonds, but to give nothing in return. These are the questions in this lawsuit, and they are momentous ones. Not only is the matter here in controversy at stake, but grave questions of law which affect the whole people of the nation.

It is therefore apparent that the rule of *stare decisis* has here no application.

RES JUDICATA.

Nor is the doctrine of *res judicata,* as distinguished from *stare decisis,* applicable. If there be one principle of this somewhat-confused subject more clearly established than another, it is that the estoppel can only apply as between the same parties and their privies, and upon the same claim or demand, and which particular demand or claim has been contested. The parties to the suit of Utter *v.* Franklin, *supra,* and Murphy *v.* Utter, *supra,* were Utter and his privies and the Loan Commission of Arizona and its privies, and they would be bound upon only contested points, upon the same claims and demands. In this action Utter and his privies are not parties; the action is between the territory of Arizona and Pima County; the claim and demand is entirely different, and the issues here have not been contested in any suit or court.

Outram *v.* Morewood, 3 East, 346—opinion of Lord Ellenborough.

Carter *v.* James, 13 M. & W., 137-147.

Cromwell *v.* County of Sac., 94 U. S., 351, '2, '3, '6, 361, and 363.

Nesbit *v.* Riverside Independent District, 144 U. S., 610, 617.

Davis *v.* Brown, 94 U. S., 423, 428.

Craft *v.* Perkins, 83 Ga., 760.

Howard *v.* Kimball, 65 Me., 308.

Smith *v.* Sherwood, 4 Conn., 276.

Watts *v.* Watts, 160 Mass., 464.

Jacobson *v.* Miller, 41 Mich., 90—opinion by Cooley.

Besides the case of Boyd *v.* Alabama, *supra,* which is decisive of the point, and also City of Philadelphia *v.* Ridge Avenue Ry. Co., 142 Pa. St., 484.

A judgment for or against a State, in regard to property, franchises, or privileges, is ordinarily binding upon all the integral parts of the State; but where a subdivision has a private and peculiar interest in the subject-matter, a judgment against the whole will not conclude the part, as to that particular and peculiar right or interest. The same rule prevails in a judgment for or against a municipality in regard to property in which a citizen claims a private individual right, and the citizen cannot be concluded as to that right by a judgment against the municipality.

24 Am. & Eng. Ency. of Law (2d ed.), 755, and cases cited.
Helphrey *v.* Redick, 21 Neb., 83.
James *v.* City of Louisville, 40 S. W. (Ky.), 912.
State *ex rel.* Kane *v.* Johnson, comptroller, 123 Mo., 43; 27 S. W., 399.
People *v.* Loeffler, 51 N. E., 794; 175 Ill., 585.
Kane *v.* School District, 47 N. W., 1076; 82 Iowa, 5.
Northern Bank of Ky. *v.* Stone, 88 Fed., 413.
Price *v.* Gwin, 144 Ind., 105; 43 N. E., 5.
State *v.* Stock, 38 Kan., 154; 16 Pac., 106.
State *v.* Burton, 47 Kan., 44; 27 Pac., 141.

And, again, the suits of Utter *v.* Franklin and Utter *v.* Murphy, *supra,* were actions maintained by the bondholders, Utter *et al.,* against the Territory of Arizona, represented by the Loan Commission. If is should be held that Pima County was a party to that litigation, the parties then were Utter *et al.,* plaintiffs, *v.* Loan Commission and Pima County, defendants. The adversaries were on one side Utter and on the other the Territory by its Commission and the county. No issues were made or joined between the defendants; they were not adversaries; they were united against a common enemy, and had no disputes to settle. In the present action Utter *et al.* are not parties; the parties are the

Territory of Arizona and Pima County, formerly codefendants. As no issues were ever made between these parties, no decisions were made affecting their rights, and as between themselves there can be no estoppel.

> "It is affirmed in Jones *v.* Verb, 121 Ind., 140, that a party, to successfully invoke the doctrine of former adjudication, must be one who in the former action tendered to the party against whom he invokes it an issue to which the latter could have demurred or pleaded; and where two or more defendants make an issue with the plaintiff, a judgment determining that issue in favor of the defendant does not settle the question between codefendants."
>
> Finley *v.* Cathcart, 149 Ind., 478.

> "It is well settled that parties to a judgment are not found by it in a subsequent controversy between each other unless they were adversary parties in the original action."
>
> Pioneer *v.* Bartsch, 51 Minn., 479.

> "To make the dismission of the former suit a technical bar, it must be an absolute decision upon the same point or matter, and the new bill, it is said, must be by the same plaintiff or his representatives against the same defendant or his representatives * * * (quoting Chancellor Kent).
>
> "To make a former judgment conclusive between the parties in another suit, in relation to the same matter, it is necessary," says Chancellor Walworth, "that the former suit should have been between the same parties."
>
> Gardner *v.* Raisbeck, 28 N. J. Eq., 75.

> "Whilst the exact limits of the doctrine of *res judicata* in its application to some cases are not definitely settled, it is accepted as generally true that the judgment relied on for that effect in subsequent litigation must have been pronounced upon the same

issues, between the same parties, or their privies, standing in an adversary character to one another."
Koelsch *v.* Mixer, 52 Ohio St., 211.

"It is the general rule that parties to a judgment are not bound by it in a subsequent controversy between each other unless they are adversary parties in the original action" (Freeman on Judgments, sec. 158; Black on Judgments, sec. 599; 21 Am. & Eng. Enc. Law, 151; McMahon *v.* Geiger, 73 Mo., 145; Gardner *v.* Raisbeck, 28 N. J. Eq., 71; Buffington *v.* Cook, 35 Ala., 312; Harvey *v.* Osborn, 55 Ind., 535; Cox's Adm'r *v.* Hill, 3 Ohio, 412, 424).
Koelsch *v.* Mixer, Adm'r, 52 Ohio St., 213.

"Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action. If A recovers judgment against B and C upon a contract, which judgment is paid by B, the liability of C to B in a subsequent action for contribution is still an open question, because as to it no issue was made or tried in the former suit." * * *
Bulkeley *v.* House, 62 Conn., 474.

We know of no better way in which to conclude this brief than in quoting the remarks of Webster, made during the course of an argument before this court, wherein matters of like import were at issue:

"But I would yet once more appeal to you as public men, as statesmen, as men of enlightened minds, capable of a large view of things, and seeing the remote consequences of important transactions, and as such I would most earnestly implore you to consider fully of the judgment you may pronounce. You are about to give a construction to constitutional provisions which may adhere to that instrument for ages, either for good or evil. I may perhaps override the importance of this occasion to the public welfare; but I confess it does appear to me that if this body give its sanction to some of the principles which have

been advanced on this occasion, then there is a power in the State above the Constitution and the laws—a power essentially arbitrary and despotic, the exercise of which may be most dangerous."

The judgment of the Supreme Court of Arizona should be reversed.

Respectfully submitted,

SAMUEL L. KINGAN,
WILLIAM HERRING,
Attorneys for Appellants.

APPENDIX.

EXHIBIT A.

[*Laws of Arizona, 1883, pp. 61, 62, 63, 64, 65.*]

No. 35.

AN ACT

To Promote the Construction of a Certain Railroad.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. Upon information in writing to the chairman of the Board of Supervisors of Pima County, Arizona Territory, by the president of the Arizona Narrow Gauge Railroad Company, the corporation of that name which filed its articles of association with the secretary of said Territory, on the 23d day of November, A. D. 1882, that said railroad company is ready to exchange bonds with the said County of Pima, according to the provisions of this act, it shall be the duty of said chairman, and he is hereby directed to call a meeting of said board, to be held within five days after the receipt of said notification, and it shall be the duty of said Board of Supervisors, and they are hereby directed to meet within five days, at the county-seat of said county, and then and there to order issued two hundred thousand dollars of bonds of said county, in denominations of one thousand dollars each, and bearing interest at the rate of seven per cent. per annum, interest payable semi-annually, the principal payable in twenty years, which said bonds and the interest coupons thereto attached shall be signed by said chairman and the clerk of said Board, and shall, within thirty days after the said order of issuance thereof has been made, be delivered by the clerk of said board to the county treasurer of said County of Pima, to be by him disposed of as hereinafter provided, and said county treasurer shall receipt to the said clerk for the said bonds.

SEC. 2. Upon the application of said railroad company to the said treasurer, and the tender by said company of fifty thousand dollars of the first-mortgage bonds of said company in like denominations, bearing like interest and payable in like time as those of said county, it shall be the duty of said treasurer, and he is hereby directed to deliver fifty thousand dollars of bonds of said county to the president and secretary of said railroad company, in exchange for fifty thousand dollars of the first-mortgage bonds of said railroad company, so tendered as above provided. And whenever and so often as each five miles of said railroad shall have been graded, laid with ties and iron, said treasurer shall upon proof thereof, which proof shall be the certificate of the county surveyor to that effect, exchange with the said president and secretary of said railroad company fifty thousand dollars of said bonds of said Pima County for fifty thousand dollars of said bonds of said company, for each five miles so completed, until the two hundred thousand dollars of bonds of said Pima County are exchanged for a like number of bonds of said railroad company.

SEC. 3. The said bonds herein provided to be issued by the said County of Pima shall be issued in the name of said county, and shall be made payable to bearer twenty years after date, and shall be made payable, both principal and interest, at the office of the county treasurer of said county issuing the same. The said bonds and coupons, in addition to being signed by the chairman and clerk of the Board of Supervisors of said county, shall also be signed by the recorder of said county, who shall affix to each bond the seal of his office.

SEC. 4. The said Board of Supervisors of Pima County issuing bonds, as aforesaid, are hereby authorized and directed, at their first regular meeting, after the issuance of the same, and in each year thereafter, until the said bonds are paid, in case there should not be sufficient moneys in the railroad fund, hereafter provided for, to pay the annual interest upon said bonds, to levy for each year a tax sufficient to meet any deficiency in said railroad fund to pay said interest, which tax, however, shall not be more than twenty cents upon each one hundred dollars of taxable property in the above-named county, which tax shall be levied and collected in the manner as is, or may hereafter be, provided by law for the levying and collecting of other territorial and

county taxes in said county, and which tax shall be known as the railroad deficiency interest tax, and the proceeds of said tax, together with the interest received by said county on the bonds of said railroad company held by said county, shall constitute a fund to be applied only to the payment of the interest on and redemption of the bonds provided for in this act to be issued by said county, and shall constitute the fund heretofore mentioned and be known as the railroad fund.

SEC. 5. The bonds of said railroad company hereinbefore provided for to be tendered and exchanged for the bonds of Pima County shall be secured by a deed of trust or mortgage to at least two trustees, of all the property, real and personal owned by said railroad company at the time of the issuance of said bonds, or that may thereafter be acquired, including, also, all franchises and privileges of whatsoever kind or nature, and which said deed of trust or mortgage shall be the first made of or on said property, and said bonds of said company shall be issued in the name of said company, and shall be made payable to bearer twenty years after date, and shall have interest coupons thereunto attached, and shall be made payable, both principal and interest, at the office of said company in the City of Tucson, in the County of Pima; and said deed of trust or mortgage shall provide that no more bonds than to the amount of thirteen thousand dollars per mile, to be secured by said deed of trust or mortgage, shall be issued by said railroad company.

SEC. 6. Whenever, in the judgment of the Board of Supervisors of Pima County, it may be deemed advisable to sell any or all of the bonds of said railroad company, received in exchange by them, as aforesaid, they are hereby authorized and empowered to direct the treasurer of said county to advertise in a newspaper published in said county, for the space of four weeks, for sealed proposals for the purchase of any or all of said bonds of said railroad company; and ten days after the said notice shall have been published, as aforesaid, the treasurer shall open the said proposals, and shall sell said bonds to the highest bidder therefor, in such lots as he may be directed by said Board of Supervisors, and the proceeds of such sale shall be placed in the said railroad fund to pay the interest and principal on the respective bonds of said county; *Provided, however,* That the treasurer may reject any and all bids; *and, provided, further,* That no sale

of such bonds shall be concluded until confirmed and approved by the Board of Supervisors by an order entered upon its minutes.

SEC. 7. Whenever, after the payment of said railroad fund of the semi-annual interest on the said bonds, there shall be any money left in said railroad fund, it shall be the duty of the treasurer of said county to advertise in a newspaper published in said county, for the space of four weeks, for sealed proposals to surrender any of the bonds of the said county, and ten days after notice shall have been published, as aforesaid, the treasurer shall open the said proposals, and shall redeem the bonds of said county, so far as the said fund on hand may be sufficient: *Provided*, those offered to be surrendered at the lowest rates shall be redeemed first: *And, provided, further*, That none shall be redeemed at a price exceeding the par value of said bonds.

SEC. 8. If, for any reason, the Board of Supervisors of the county herein named fails to meet at the times herein designated, it shall be the duty of said board to meet on each succeeding Monday thereafter until the acts provided to be done by said board, under the provisions of this act, have been fully done and completed, and all the acts of said board so done in the premises, subsequent to the times hereinbefore designated, shall be as valid as though done within the time hereinbefore prescribed.

SEC. 9. A copy of the articles of association, certified by the Secretary of the Territory of Arizona, of the Arizona Narrow Gauge Railroad Company, and endorsed as filed by said secretary on the 23d day of November, A. D. 1882, shall be sufficient proof to the Board of Supervisors of Pima County or officers herein named of the identification of said Arizona Narrow Gauge Railroad Company herein mentioned. The route of said road shall in all respects, so far as practicable, conform substantially to the route set forth in the articles of incorporation of said company now on file in the office of the secretary of this Territory.

SEC. 10. This act shall take effect and be in force from and after its passage.

Approved February 21st, 1883.

EXHIBIT B.

MEMORIAL.

To the Senate and House of Representatives of the United States of America in Congress assembled:

Your memorialists, the Legislative Assembly of the Territory of Arizona, beg leave to submit to your honorable bodies that—

Whereas, under various acts of the Legislative Assembly of the Territory of Arizona, certain of the counties of the Territory were authorized to issue, in aid of railroads and other quasi-public improvements, and did under such acts issue bonds, which said bonds were sold in open market, in most instances at their face value, and are now held at home and abroad by persons who, in good faith, invested their money in the same, and, save and except such knowledge as the law imputes to the holder of bonds issued under authorized acts, are holders of the same; and

Whereas the validity of these bonds for many years after their issuance was unquestioned, and acknowledged by the payment of the interest thereon as it fell due; and

Whereas there has recently been raised a question as to whether these acts of the Legislative Assembly were valid under the organic law of the Territory, which had led to movement looking to the repudiation of the indebtedness created under and by virtue of such acts; and

Whereas we believe that such repudiation would, under the circumstances, work great wrong and hardship to the holders of such bonds, and at the same time seriously affect the credit and standing of our people for honesty and fair dealing and bring us into disrepute:

Therefore we most strongly urge upon your most honorable bodies the propriety and justice of passing such curative and remedial legislation as will protect the holders of all bonds issued under the authority of acts of the Legislative Assembly, the validity of which has heretofore been acknowledged; and that you further legislate as to protect all innocent parties having entered into contracts resulting from inducements offered by our territorial legislation, and

relieve the people of the Territory from the disastrous effects that must necessarily follow any repudiation of good faith on the part of the Territory; and that you may so further legislate as to validate all acts of the Legislative Assembly of the Territory which have held out inducements for the investment of capital within the Territory, and which have led to the investment of large sums of money in enterprises directly contributing to the development and growth of the Territory, and thus relieve the honest people of the Territory from the disastrous effects that must necessarily follow any violation of good faith on the part of our people.

Resolved, That our delegate to Congress be, and he is hereby, instructed to use all honorable means to bring this subject to the earnest consideration of Congress; that the secretary of the Territory be, and is hereby, requested to transmit a copy of the foregoing to each house of Congress and to our delegate in Congress.

EXHIBIT C.

(*United States Statutes at Large, 54th Congress, 1895-97, Vol. 29, p. 262.*)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the acts of Congress approved June twenty-fifth, eighteen hundred and ninety, and August third, eighteen hundred and ninety-four, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the act of Congress approved June twenty-fifth, eighteen hundred and ninety, until January first, eighteen hundred and ninety-seven, and all outstanding bonds, warrants, and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities, and school districts thereof, heretofore authorized by the legislative enactment of said Territory bearing a higher rate of interest than is authorized

by the aforesaid funding act approved June twenty-fifth, eighteen hundred and ninety, and which said bonds, warrants, and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized, shall be funded, with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds, as provided by this act.

SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the Loan Commission of Arizona under the provisions of the act of Congress approved June twenty-fifth, eighteen hundred and ninety, and the act amendatory thereof and supplemental thereto, approved August third, eighteen hundred and ninety-four, are hereby declared to be valid and legal for the purpose for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory, as hereinbefore authorized to be funded, are hereby confirmed, approved and validated, and may be funded as in this act provided until January first, eighteen hundred and ninety-seven: *Provided*, That nothing in this act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants, or other evidences of indebtedness by this act approved, confirmed, and made valid, and authorized to be funded.

Approved, June 6, 1896.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 67.

E. S. VAIL, PHIL S. HUGHES, C. F. RICHARDSON,
SUPERVISORS OF PIMA COUNTY, APPELLANTS,

v.

TERRITORY OF ARIZONA, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

Res Judicata.

The doctrine of *res judicata* has no place in this lawsuit, and for the following reasons:

1. The only cases that give color to the application of the doctrine here are Utter *v.* Franklin, 172 U. S., 416, and Utter *v.* Murphy, 186 U. S., 95. These were suits brought by Utter and other bondholders against the Territory of Arizona as represented by its Loan Commission. For the sake of argument, grant that the County of Pima was also a defendant, and did help to defend the actions. The claim and demand in both cases was a claim and demand against the Territory; that claim and demand was that the Territory fund the county bonds into Territory bonds, for which latter the faith and credit of the whole Territory should stand pledged.

The claim and demand in this action is a claim and demand by the Territory that the county levy a tax to pay to the Territory interest money, which the Territory has already paid. The Utters and their privies have nothing to do with this action.

Here, then, are claims and demands entirely distinct and different. This court has held:

> "As was said in Cromwell *v.* County of Sac, 94 U. S., 351, 353: 'In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action.' "
>
> McComb *v.* Frink, 149 U. S., 641.

What, then, were the points or questions actually litigated and determined in the Utter cases? In Utter *v.* Franklin the one point contested and decided was that the case of Lewis *v.* Pima County, 155 U. S., 54, was not *res judicata;* in Utter *v.* Murphy the only points contested and decided were that the mandate did not abate by reason of a change of personnel in the Loan Commission, and that the Legislature of Arizona could not repeal the act creating the Loan Commission, because it was an act of Congress. *These were the sole points determined.* The question of the validity of Act No. 35, Laws of Arizona, 1883, and the act of Congress of June 6, 1896, under the Constitution was not even broached.

It must follow, then, that the Utter cases are not *res judicata.*

2. One of the chief distinguishing badges of estoppel is here missing—*i. e.*, identity of parties. In the Utter cases, as before stated, the Utters and other bondholders were plain-

tiffs, and the Territory and, on the hypothesis here granted for argument, The County of Pima were defendants. The Utters are not in this lawsuit at all, nor any one in privity with them, and so there is no identity of parties.

The parties here were codefendants before, and between them was no issue. In the nature of the matter there could be none; both denied any obligation of any kind to the common plaintiffs. During all the time of the former litigation their interests were one and mutual; it would have been impossible for them to have, other than they were, united against a common foe. Now, for the first time, they occupy adversary positions.

We have already cited in the main brief numerous authorities to show that *res judicata* has no application to such a case.

3. And, finally, he who would avail himself of the benefit of a former decision must plead the judgment, and especially is this true under the code of Arizona. *Res judicata* is not a right, but a privilege, and may be availed of or not, as the party elects; if he does elect to avail himself of it he must so declare, else he shall be deemed to have waived it.

This case is here on the pleadings and on nothing else. The Supreme Court of Arizona decided the case on the pleadings. If *res judicata* is to be considered, the foundation for the plea must be in these pleadings, and it is not here. The sole reference in the complaint to the former cases is that the bonds here in issue are the same bonds "that were the subject of litigation, as to their validity, in the several actions entitled Charles Edward Lewis *v.* Pima County, and Utter *v.* Franklin, and Utter *v.* Murphy, respectively, heretofore tried and determined in this court and in the Supreme Court of the United States" (Record, folio 71).

We readily admit they are the same bonds—that is, the same general subject-matter of litigation. But this is no plea of former adjudication; if it be, then Lewis *v.* Pima

County is so plead—the suit in which the bonds were held void—for it is classed with the others. The utmost that can be said for the allegation is that it declares the bonds to be the same bonds. The essentials of an estoppel—that is to say, the identity of parties, the identity of cause of action, the merits, the finality—are all lacking. *Res judicata* is not plead.

> "Upon this the doctrine of *res judicata* is invoked to uphold the judgment. A sufficient answer is that neither by pleadings nor evidence were the proceedings in this other case brought before the Court of Claims in the present suit. If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata,* and this although such prior judgment may have been rendered by the same court."
>
> United States *v.* Bliss, 172 U. S., 321.

As this case was tried below on the pleadings only, as it is here on the pleadings alone, and as *res judicata* is not pleaded or set up, it should be disregarded, and the case decided on the merits. It is the record in this case that should control and not the record in some other case that is not before the court.

Respectfully submitted.

SAMUEL L. KINGAN.
WILLIAM HERRING.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Office Supreme Court, U. S.
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No. 67.

E. L. VAIL ET AL., SUPERVISORS OF PIMA COUNTY, APPELLANTS,

vs.

TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEE.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 28668

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 67.

E. L. VAIL ET AL., SUPERVISORS OF PIMA COUNTY, APPELLANTS,

vs.

TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEES.

Statement of the Case.

This was a proceeding in mandamus brought by the Territory of Arizona to compel the defendants, as the supervisors of Pima County, to make tax levies directed by the territorial authorities for the purpose of reimbursing the territory interest paid by it upon territorial bonds issued by the loan commissioners of the territory, under compulsion of a writ of mandamus, in lieu of subsidy bonds of Pima County issued in 1883 in aid of the construction of the Arizona Narrow Gauge Railroad pursuant to an act of the legislature of Arizona approved February 21, 1883.

These so-called Narrow Gauge bonds were repudiated by

Pima County and, in a suit brought by one Lewis against the county upon interest coupons thereof, it was contended that these bonds were issued contrary to the restrictions imposed by Congress upon the legislatures of territories, that the act of 1883 conferred an especial privilege upon the railroad company within the meaning of section 1889, R. S. U. S., inhibiting the granting of private charters and especial privileges, *and that the act of 1883 was mandatory and compulsory.*

Upon appeal to this court (Lewis *v.* Pima County, 155 U. S., 54, decided Oct. 29, 1894) it was held that these bonds were issued contrary to the restrictions imposed by Congress upon territorial legislatures and were, therefore, void, the court saying that this ruling rendered it unnecessary to pass upon the other questions.

In 1887 the legislature of Arizona created a board of loan commissioners with authority to refund territorial indebtedness.

In 1890 Congress passed an act approving and re-enacting this funding act subject to future territorial legislation, and inserting a provision authorizing county officers to report county, municipal, and school district indebtedness to such loan commissioners for refunding in the same manner as territorial indebtedness, and providing for the levy of local taxes to pay the interest and principal of such refunded bonds.

In 1891 the legislature of Arizona enacted a new funding law, incorporating the provisions of the act of Congress of 1890, and providing that the loan commissioners should provide for the liquidation, funding and payment of indebtedness existing and outstanding on December 31, 1900, of the territory, counties, municipalties, and school districts, by the issuance of bonds of the territory, and authorizing any holder of bonds of the territory or any county, municipality, or school district, existing and outstanding on said date, to exchange the same for territorial bonds. This act also

provided for the levy of taxes upon the particular county, municipality, or school district to reimburse the territory for interest upon bonds issued in lieu of local bonds or indebtedness.

This legislation by Congress and the territorial legislature did not apply to numerous issues of bonds which, under the decision in Lewis *v.* Pima County, were invalid; and the territorial legislature, recognizing the equity of the holders of such bonds, adopted a memorial to Congress urging curative legislation.

Thereupon Congress passed the act of June 6, 1896 (29 Stat., 262), as follows:

"An act amending and extending the provisions of an act of Congress, entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890, and the act amendatory thereof and supplemental thereto, approved August 3, 1894.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of the acts of Congress approved June 25th, 1890, and August 3rd, 1894, authorizing the funding of certain indebtedness of the Territory of Arizona, are hereby amended and extended so as to authorize the funding of all outstanding obligations of said Territory, and the counties, municipalities and school districts thereof, as provided in the act of Congress approved June 25th, 1890, until January 1st, 1897, and all outstanding bonds, warrants and other evidences of indebtedness of the Territory of Arizona, and the counties, municipalities and school districts thereof, heretofore authorized by legislative enactments of said Territory bearing a higher rate of interest than is authorized by the aforesaid funding act approved June 25th, 1890, and which said bonds, warrants and other evidences of indebtedness have been sold or exchanged in good faith in compliance with the terms of the acts of the legislature by which they were authorized shall be funded with the interest thereon which has accrued and may accrue until funded into the lower interest-bearing bonds as provided by this act.

"SEC. 2. That all bonds and other evidences of indebtedness heretofore funded by the loan commission of Arizona under the provisions of the act of Congress approved June 25th, 1890, and the act amendatory thereof and supplemental thereto approved August 3rd, 1894, are hereby declared to be valid and legal for the purposes for which they were issued and funded; and all bonds and other evidences of indebtedness heretofore issued under the authority of the legislature of said Territory as hereinbefore authorized to be funded are hereby confirmed, approved and validated, and may be funded as in this act provided until January 1st, 1897: *Provided*, That nothing in this act shall be so construed as to make the Government of the United States liable or responsible for the payment of any of said bonds, warrants or other evidences of indebtedness by this act approved, confirmed and made valid, and authorized to be funded."

The holders of these so-called Narrow Gauge bonds, conceiving that this act of 1896 applied to them, thereupon made demand upon the officers of Pima County to apply to the territorial loan commissioners for the issuance of territorial bonds in lieu of these county bonds pursuant to the act of Congress of 1890 and the territorial act of 1891. This demand being refused, they then made demand upon the loan commissioners to issue such territorial bonds and, upon refusal, filed in the Supreme Court of the territory mandamus proceedings against said commissioners.

The loan commissioners demurred, contending that Congress had not the power, and did not intend, to validate these so-called Narrow Gauge bonds, and pleaded Lewis *v.* Pima County as *res judicata* of the invalidity thereof.

The writ was denied, but, on appeal, this court overruled all of the contentions of the loan commissioners, reversed the court below, and remanded the case for further proceedings not inconsistent with its opinion (Utter *v.* Franklin, 172 U. S., 416, January 3, 1899).

It does not appear by the record in Utter *v.* Franklin that the defense of this suit was undertaken by Pima County

otherwise than that Mr. C. W. Wright, who had appeared for the county in the Lewis case, appeared as counsel for the respondents.

But upon the going down of the mandate there was filed on behalf of the respondents, by leave of the court below, an amended return signed by Rochester Ford and C. W. Wright, as attorneys for the respondents, and verified by the chairman of the board of supervisors of Pima County, as follows:

"TERRITORY OF ARIZONA, *Pima County, ss:*

"M. G. Samaniego, being by me first duly sworn, on his oath says: That he is the chairman of the board of supervisors of the said county; that affiant has carefully read the above and foregoing return and answer and knows well the contents thereof; that the same is true in substance and in fact of his own knowledge, save as to the matters and things therein stated on information and belief, and as to these matters affiant believes them to be true.

"(Signed) M. G. SAMANIEGO.

"Subscribed and sworn to before me this 31st day of May, 1899.

"(Signed) S. E. HAZZARD,
"Notary Public."

Paragraphs IX and XVII of this amended return were as follows:

"IX.

"And for a further return these respondents allege: that the said Pima County does not wish to fund said bonds and coupons nor any thereof; and for the reason that if said bonds are funded, a new contract is thereby created, wherein and whereby said alleged indebtedness will not mature for 50 years next ensuing; *and that said county, while your respondents constitute the loan commission of the Territory of Arizona, did officially notify said loan commission that it would not enter into such new contract, and would not consent to the funding of the said bonds, and did instruct said*

loan commission not to fund said bonds, and for the reason that, in funding said bonds, a new contract would be made to which said Pima County was not a party and would not be a party."

"XVII.

"And for a further defense thereto defendants plead as a counter-claim or set-off the said bonds and coupons of the said Arizona Narrow Gauge Railroad Company hereinbefore set out and described, and defendant avers that none of the said bonds or coupons have been paid, but that the same and all thereof are now due the said Pima County so far as the same have matured and are unpaid."

This amended return also averred facts concerning the issuance of said Narrow Gauge bonds and the subsequent history of the railroad, by which it was sought to show that Pima County had received no consideration for these bonds, and that they did not, in fact, come within the terms of the act of Congress of 1896. These allegations were, in substance: that the bonds and coupons sought to be refunded were not delivered by any one authorized by Pima County to do so; that the county never acknowledged the validity of the bonds or paid interest thereon; that the railroad was never constructed, equipped, or operated; that Pima County never received any consideration whatever for the bonds; that the petitioners were not innocent holders of the bonds, and that the bonds and coupons were not sold or exchanged in good faith and in compliance with the act of the legislature by which they were authorized. The return also set up other defenses which had not been set up in the original answer or return, but with which we are not now concerned.

The petitioners filed a reply to this amended return, a referee was appointed, voluminous testimony was taken on the issues of fact, and the Supreme Court of the Territory made findings of fact.

These findings comprise a complete history of the Arizona Narrow Gauge Railroad Company, commencing with the

filing of its articles of incorporation, a copy of which is set out therein; a copy of its subscription agreement also appears; and the facts relating to the exchange of the railroad bonds for the county bonds are fully stated.

It appeared that no interest was paid upon these Narrow Gauge bonds, and that the then present owners bought them as they matured with notice that the first coupons had been protested and that the bonds had been repudiated by Pima County from the start; but the court found that these bonds were issued in literal compliance with the act of the territory of 1883 in exchange for bonds of the railroad company, and held that, as the act of 1883 did not make the completion of the railroad a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith could not be predicated of the transaction so long as there was not only a substantial compliance, but a literal as well, with the requirements of the act under which they were issued, and that, therefore, these bonds had been "sold or exchanged in good faith in compliance with the terms of the act of the legislature by which they were authorized," within the meaning of the act of Congress of 1896, and, overruling all of the other defenses made by the loan commissioners, awarded the writ of mandamus.

On appeal to this court the judgment below was affirmed (Murphy *v.* Utter, 186 U. S., 95).

The second amended petition in the present case avers that on March 13, 1903, these so-called Narrow Gauge bonds were in the hands of innocent purchasers for value and were legal, valid, and subsisting obligations of Pima County, and that they were the same bonds that were the subject of litigation in Lewis *v.* Pima County, Utter *v.* Franklin, and Murphy *v.* Utter; that on said day the loan commissioners issued in lieu thereof certain territorial bonds, interest upon which had accrued and been paid by the territory; that it was the duty of the respondents as the board of supervisors of Pima

County to annually levy a sufficient tax to pay the interest on said territorial bonds; that the board of equalization of the territory had fixed the rate of taxes to be levied in Pima County for the purpose of paying the interest on the funded indebtedness of said county, including the interest upon said territorial bonds, and that the territorial auditor had duly certified the levy of such taxes to the said board of supervisors of Pima County for the purpose of having the same included in the tax rolls of said county; but that the said supervisors had refused to make the levy necessary to pay the interest upon said bonds issued in lieu of said Narrow Gauge bonds, and praying the writ of mandamus.

The respondents filed a general demurrer, a plea of *res judicata*, setting up the judgment in Lewis *v.* Pima County in bar, and a further answer by way of denial that said Narrow Gauge bonds were valid obligations of said county or in the hands of purchasers for value. They also filed a full answer by paragraphs, setting up that at the time the first $50,000 of these Narrow Gauge bonds were issued the railroad company owned no property, real or personal, and had done nothing except to incorporate, issue its bonds, and execute a trust deed; that neither the officers nor the people of Pima County petitioned for the passage of the territorial act of 1883, nor did they subsequently to the passage thereof approve or consent to the same; that the railroad company discontinued work after grading a roadway and laying ties and rails for ten miles; that no train, save one engine and a few dirt cars, was ever run upon said railroad; that the railroad was built across a tenantless desert, and in a few years fell into complete ruin and decay; that the rails were sold for old iron, and nothing was left but a slight elevation in the desert, and that no action was ever taken by the railroad company under the acts of Congress to secure a right of way; that Pima County never recognized the validity of the said Narrow Gauge bonds, and did not pay interest thereon, and did not recognize the funding bonds issued by the territory in

lieu thereof, and has not paid any interest on such funding bonds, and concluding with the allegation that the act of Congress of 1896 did not and could not legalize the said bonds, and that the same were and are void, and that the action of the loan commission in funding the same was and is a void act, and was and is not binding upon Pima County.

Conceiving that the judgment in the Utter case was binding upon the county or, in any event, that the rule of *stare decisis* applied, inasmuch as all of the facts set up by way of defense had been found by the Supreme Court of the territory in the Utter case and all of the questions of law raised by the pleadings in this case had been presented there, the attorney-general moved for judgment on the pleadings.

The court below considered only the contention that Congress itself had not power to enact legislation such as the territorial act of 1883 and could not by a subsequent act validate bonds issued under compulsion of such territorial act, saying (opinion, Record, page 27):

"The respondents maintain that the bonds in question are void by reason of the fact that the act of the legislature *commanded* the county to issue the bonds, and hence the writ should not issue; and that, as this question has not been determined by the Supreme Court of the United States, this court may properly pass upon it. Even if it be that the question is an open one, and the validity of these bonds has not been conclusively determined by the Supreme Court of the United States, still we think the contention of the respondents is not well taken. It is conceded that Congress could validate these bonds by subsequent legislation, if it had the power to pass the act in question in the first instance, but it is contended that Congress could not have compelled the county to issue the bonds, and therefore cannot give life to bonds issued under compulsion of such an act as that passed by the territorial legislature.

"Without deciding the point, if it be conceded that neither under such an act of the legislature, nor under a like act passed by Congress could the county have been compelled to issue or deliver these bonds, and that its officers could with impunity have successfully defeated the act by refusing com-

pliance therewith, the fact is, nevertheless, that the county did avail itself of the act, and issued and delivered the bonds. In the absence of legislative authority, a municipality may not issue such bonds; it may issue them if so authorized. Assuming that the act of the legislature became in effect the act of Congress by virtue of the retroactive effect of the remedial act of Congress, it cannot successfully be maintained that the county acted without legislative authority, because in its language the act was mandatory, and not merely permissive. So far as the act commanded the issuance of the bonds, it might not have been enforceable, had the county chosen to disregard it, but in this case the county did issue the bonds, and thus complied with the requirement; and we think the act of the legislature constituted adequate permissive legislation to support the action of the county in issuing the bonds."

The respondents now appeal to this court, and, as we conceive their position, abandon all else and contend only that the territorial act of 1883 and the act of Congress of 1896, as applied to the bonds in question, contravene the 5th amendment to the Constitution for the reason that the county was commanded to issue the bonds without benefit or compensation, and that this point is not *res judicata* or *stare decisis*.

The appellees contend:

I. That the question is *res judicata* because

(*a*) The loan commissioners, for the purposes of the proceedings in the Utter case, were officers of Pima County as well as of the territory;

(*b*) The defense of the Utter case was, in fact, undertaken and conducted by Pima County.

II. That if the point now urged is not *res judicata* it is at least *stare decisis*.

III. That, in any event, Congress had power to validate the bonds in question.

ARGUMENT.

I.

RES JUDICATA.

(a) The loan commissioners, for the purposes of the proceedings in the Utter case, were officers of Pima County as well as of the territory.

Congress, in the act of June 25, 1890 (26 Stat., 175), reenacting the territorial funding act of 1887, inserted in paragraph 2048 (section 10) the following provision:

"The boards of supervisors of the counties, the municipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the Territory their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the municipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other territorial indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law to said county, municipality or school district, upon official demand by said authorities; the county, municipality or school district to pay into the territorial treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the territorial board of equalization, or on their failure by the territorial auditor to be levied for the payment of the principal of the bonds issued in redemption, refunding or other bonds issued to such county, municipality or school district when the same shall become due, and in addition a rate of interest paid by the Territory on such bonds."

In the following year the territorial legislature passed the further funding act entitled "An act to provide for funding

territorial, county, and other indebtedness, and being supplemental to the act of Congress entitled 'An act approving with amendments the funding act of Arizona,' approved June 25, 1890," and consisting mainly of details for carrying out the extension by Congress of the funding plan to county, municipal, and school district indebtedness. The full text of this act is printed as an Appendix hereto.

We submit that, under these statutes, the loan commissioners act as the officers of the county, as well as of the territory, in exchanging county bonds for territorial bonds, and that when the performance of their function in that respect is enforced by legal proceedings the result is binding upon the county and forecloses any litigation over the same subject-matter between the county or its officers and the territory.

The case of Gunter *v.* Atlantic Coast Line Railroad Company (200 U. S., 273) is in point. There county officers were held, by virtue of the state laws, to be officers of the state as well, for the purposes of a suit brought against them by a railroad company to enjoin the collection of certain taxes, and in a subsequent suit attempted to be brought by the state against the railroad company the plea of *res judicata* was sustained.

(*b*) *The defense in the Utter case was, in fact, undertaken and conducted by Pima County.*

As we have seen by reference to the record in the Utter cases, demand was first made upon the county officers to apply to the loan commissioners for the funding of the bonds in question. Demand was then made upon the loan commissioners to refund the bonds, and the county officers notified them that the county would not consent and instructed them not to do so (Ex. A, page 6 of record in No. 94, Oct. Term, 1898). Mr. C. W. Wright, who was counsel for the county in Lewis *v.* Pima County, appeared as counsel

for the respondents in the Utter case, assisting the attorney-general, argued Utter *v.* Franklin in this court, and, as one of counsel for the respondents in the case (the attorney-general not appearing), filed the amended return, which was verified by the chairman of the board of supervisors of Pima County and which alleged that the county had instructed the loan commissioners not to refund the bonds in question and set up the railroad bonds held by the county as an offset or counter-claim (pages 17 and 20, record in No. 388, Oct. Term, 1901).

And, as matters of perhaps slight importance, it appears that in support of an application for postponement of the hearing of the case, Mr. Wright filed an affidavit, wherein he averred that the issues involved in the case and the amount at stake were of great importance and of dire consequence to the taxpayers of Pima County (*Ibid.*, p. 76). His associate, Mr. Ford, filed an affidavit, averring that in his opinion the interests of his clients demanded further time for the preparation of the case and would be jeopardized unless further time were granted, evidently referring to the people of the county (*Ibid.*, p. 77.) And in a motion to order a jury trial in Pima County it is alleged that counsel in the case resided in Pima County (*Ibid.*, p. —).

We submit, therefore, that it is apparent that the loan commissioners acted upon instructions from Pima County and that the county undertook and conducted the defense of the Utter case, as it was apparent in Gunter *v.* Atlantic Coast Line Company, *supra*, that the state had, in fact, undertaken the defense of the previous suit against county officers, where the attorney-general had signed the answer for the county officers and verified it in his official capacity, and other circumstances similar to those above noted were considered.

II.

EVEN IF THE DOCTRINE OF *res judicata* OR ESTOPPEL DOES NOT APPLY, THE PRESENT CONTENTION IS *stare decisis*.

The appellants insist that the particular point now urged by them against the power of Congress to validate the bonds in question, viz., that the territorial act of 1883 is obnoxious to the 5th amendment, was not passed upon by this court either in Utter *v.* Franklin or Murphy *v.* Utter.

In Lewis *v.* Pima County it was contended that the territorial act of 1883 was void because it commanded the county to issue the bonds, but this court found it unnecessary to pass upon that question.

In Utter *v.* Franklin it was contended that these bonds were without equitable consideration, and that their invalidity, not being caused by any irregularity, could not be validated by Congress (Brief for Appellees, subd. V). The conclusion of the appellees' brief was:

"Can Congress legislate into these void bonds life, make a contract where none existed, and take the money of the county and give it to these petitioners?"

In the brief for the appellants in that case it was contended that Congress had absolute power of legislation over Pima County, and could declare and provide that bonds which had been issued by Pima County should be valid and treated as such (page 43); that Congress had power to pass the curative act; that Congress has as much absolute right to govern the Territory of Arizona, or any county therein, directly and absolutely and without consulting the territory or the county, as it has to govern the District of Columbia; that Congress is not obliged to consult either the people or any local officers (page 39).

In Utter *v.* Franklin the decision in Lewis *v.* Pima County was urged as *res judicata*, and the question which had been

presented, but not decided, was necessarily brought to the attention of the court in connection with the contention above noted.

That this court did, in fact, in the Utter cases consider the territorial act of 1883 in connection with the 5th Amendment and dispose of the present contention is apparent from the language of its decisions.

In Utter *v.* Franklin (page 423), it was said:

"We think it was within the power of Congress to validate these bonds. Their only defect was that they had been issued in excess of the powers conferred upon the territorial municipalities by the act of June 8, 1878. There was nothing at that time to have prevented Congress from authorizing such municipalities to issue bonds in aid of railways, and that which Congress could have originally authorized it might subsequently confirm and ratify. This court has repeatedly held that Congress has full legislative power over the territories, as full as that which a State legislature has over its municipal corporations."

And in Murphy *v* Utter (at page 112), is was said:

"It is true that the county of Pima derived little or no benefit from the building of the few miles of railroad, but, as was said by the Supreme Court, 'there was nothing in evidence showing bad faith on the part of the railroad company, in so far as the first exchange of bonds was concerned, nor is there any evidence which shows bad faith on the part of the company or its contractor, Walker, and his principals, Coler & Company, except their failure to continue the building and equipment of the road after the completion of the 30 miles of grading and laying of 10 miles of track, except such inferences as may be drawn from the fact that both the railroad company and Coler & Company had difficulty in raising the money for the payment of the work done, and did not have the resources to go on and complete the work. Can the court say that, notwithstanding the fact that the bonds were exchanged in compliance with the terms of the act of February 21, 1883, they are invalid and not within the provisions of the act of Congress of June 6, 1896, because subsequent to their issue the original holders of those bonds failed to complete the railroad, and the county of Pima

thereby received no benefit from the same? The question of a failure of consideration is to be distinguished from that of an exchange of bonds in good faith under the act of June 6, 1895, unless the failure of consideration was due to a failure on the part of the holders of the bonds to comply with the provisions of the act authorizing their issuance. The legislative act was exceedingly liberal in its terms, and contained no safeguard against the failure of the railroad company to build or operate the road. The only provision looking to the protection of the county was the one which required a certificate of the county surveyor, showing that each 5 miles of the road was graded and laid with ties and iron, as a condition precedent to the exchange of each $50,000 of county bonds for a like amount of railroad bonds. As the Supreme Court has held in this case, Congress, by the act of June 6, 1896, validated the territorial act of February 21, 1883. And as the latter did not make the completion of the road a condition precedent to the issuance of the bonds, nor make their validity dependent upon the subsequent conduct of the railroad company, bad faith cannot be predicated of the transaction so long as there was not only a substantial compliance, but a literal as well, with the requirements of the act under which they were issued.' "

III.

CONGRESS HAD POWER TO VALIDATE THE BONDS IN QUESTION.

The appellants concede that Congress has power to compel a county to issue bonds in aid of a railroad, but insist that such power is limited and controlled by the 5th amendment to the extent that in such case the county shall receive adequate benefit or consideration. They concede that the validity of such legislation is to be determined by the terms of the act itself, and contend that by the terms of the territorial act of 1883 the county was left without security and could receive no benefit or consideration. And it is argued that the territoral act of 1883 commanded the issuance of the bonds without limitation or condition, save as to the first few miles of road, and with no assurance or guarantee that

the road would be built, and that the first $50,000 of the bonds were commanded to be issued to a railroad company which owned no property and was under no obligation to use such aid in the construction of a railroad or for any public purpose.

We submit, however, that whether or not, and to what extent, the county will be benefited by the proposed railroad, is manifestly a question for the legislature, as are likewise the details of the plan by which county aid is to be extended, and that the decisions in Utter *v.* Franklin and Murphy *v.* Utter are conclusive of the constitutionality of the legislation in question.

We also press the view of the court below that the mandatory feature of the territorial act of 1883 is eliminated by reason of the act of the county in issuing the bonds in question under the authority of that act.

Respectfully submitted.

E. S. Clark,
Attorney for Appellee.

Horace F. Clark,
William C. Prentiss,
Of Counsel.

APPENDIX.

An act to provide for funding territorial, county and other indebtedness and being supplemental to the act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 25, 1890.

Be it enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. That the act of Congress entitled "An act approving with amendments the funding act of Arizona," approved June 25th, 1890, be and the same is hereby now re-enacted as of the date of its approval, subject to the modifications and additional provisions hereinafter set out, and to carry out the purpose and intention of said act of Congress, the loan commissioners of the Territory of Arizona shall provide for the liquidation, funding and payment of the indebtedness existing and outstanding on the 31st day of December, 1890, of the Territory, the counties, municipalities and school districts within said Territory, by the issuance of bonds of said Territory, as authorized by said act, and all bonds issued under the provisions of this act and the interest thereon shall be payable in gold coin of the United States.

SEC. 2. Whenever the said loan commissioners shall redeem, refund or pay any indebtedness of a county, municipality or school district, or issue bonds to such county, municipality or school district as authorized by said act of Congress, the territorial treasurer shall open and keep an account with said county, municipality or school district, and shall at once make out and transmit to the proper officer or officers charged with the administration of the affairs of said county, municipality or school district, a statement under his official seal, showing the amount and character of the indebtedness of said county, municipality or school district, refunded or paid, the amount of bonds issued therefor, when due and payable, rate of interest and amount of interest that will be required to be paid annually thereon.

And said officer or officers shall file said statement in the proper office as a record therein

SEC. 3. In all cases of funding and paying the indebtedness of any county or school district in such county, the board of supervisors of such county, or, of funding and paying the indebtedness of any municipality, the executive or other proper officer or officers of such municipality, shall annually, at the time of assessing and levying taxes therein, cause to be assessed and levied each year upon the taxable property of the county in case of county indebtedness, municipality in case of municipal indebtedness, and school district in case of school-district indebtedness, and in addition to other authorized taxes, a sufficient sum to pay the interest on the bonds issued and disposed of under the provisions of this act, for the benefit of such county, municipality or school district respectively. And fifty (50) years after such bonds shall have been issued, such additional amount shall be levied, annually, as will pay ten per cent. of the total amount issued until all the bonds issued under the provisions of this act are paid. And all taxes shall be assessed, levied and colected as other county, municipal and school-district taxes are collected, and shall be paid into the territorial treasury.

SEC. 4. If sufficient money shall not be realized each year from the collection of taxes to pay the interest on said bonds when due, the deficiency shall be paid out of the money, fund or funds, used for defraying the general expenses of such county, municipality or school district, for funding, redemption and payment of whose indebtedness said bonds were issued, which said deficiency shall be paid by the proper officer or officers in charge of said money, fund or funds, upon the official demand thereof by the territorial treasurer. All money collected in any county, municipality or school district, for the payment of said interest remaining after such payment, shall be paid into said fund or funds used for the general expenses of such county, municipality or school district.

SEC. 5. It shall be the duty of the respective county, municipal and school district officers, whose duty it is to levy and collect the taxes therein, to levy and collect the tax in this act provided for the payment of the principal and interest of said bonds when due and payable and to pay the same into the territorial treasury at the time and times of the pay-

ment of the territorial taxes. Any failure to comply with the conditions and provisions of this act by any officer or officers charged with the performance thereof, or any neglect or refusal by him or them to levy, collect or pay over such taxes as aforesaid, or to apply the money collected under this act otherwise than for the purpose for which it was collected, shall be deemed a misdemeanor and upon conviction in a court having jurisdiction thereof, the person so convicted shall be fined in an amount equal to the sum that should have been levied and collected, or for any misappropriation of the moneys so collected, in an equal amount to the sum not applied as in this act provided, and imprisoned as in other cases of misdemeanor, in the discretion of the court. And if the said proper officer or officers shall fail to levy the taxes as in this act provided he or they may be compelled to perform such duty by any court having jurisdiction thereof. Provided, that in case of such failure, the territorial board of equalization, or, upon their failure to act, the territorial auditor shall levy sufficient taxes in the different counties, municipalities and school districts to carry out the provisions of this act and the act of which this is supplemental. Said board and auditor, or either of them, may require the proper officer or officers of the county, municipality or school district, whose indebtedness has been refunded, and it shall be their duty to furnish said board or auditor such information as will enable said board or auditor to carry out the provisions of this act and said act of Congress. When the tax is so levied by the territorial board of equalization or territorial auditor, he or they shall transmit to the board of supervisors, in the case of the county and school district tax, and to the proper officers in the case of municipal tax, or to such other officer or officers exercising like duties, a statement of the rate of taxes fixed and levied upon the property within said county, municipality or school district, for the purpose aforesaid, and the proper county, municipal and school district officers shall enter upon the tax-roll and proceed to collect the tax levied, as other county, municipal and school district taxes are collected.

Sec. 6. The board of supervisors of each county shall fix and define the boundaries of each school district within the county, and all taxable property and the increase thereof, within the limits of each county, municipality or school

district, is hereby pledged to the payment of any and all bonds and the interest thereon issued for the benefit of such county, municipality or school district respectively. And in the event of the division, disincorporation or dissolution in any manner of any such county, municipality or school district, the board of supervisors of each county, or other board of officers exercising the like duties, and in case of their failure to act, then the territorial board of equalization, and upon their failure to act the territorial auditor or other officer exercising like duties, shall cause the proper taxes to be assessed and levied upon the taxable property within the limits of such county, municipality or school district, at and from the time of the issuance of the bonds for its benefit, to meet the payment of such bonds and the interest thereon.

SEC. 7. Any person holding bonds, warrants or other evidence of indebtedness of the Territory of any county, municipality or school district within the Territory, existing and outstanding on the 31st day of December, 1890, may exchange the same for the bonds issued under the provisions of this act at no less than their face or par value and the accrued interest at the time of exchange; but no indebtedness shall be redeemed at more than its face value and any interest that may be due thereon.

SEC. 8. The provisions of said act of Congress relating or applying to the liquidation, refunding and redeeming of the territorial indebtedness, sale or exchange of bonds, receiving and applying the proceeds, shall apply and be the method used for the liquidation, refunding and redeeming the payment of the indebtedness of the counties, municipalities and school districts of this Territory authorized and contemplated by said act. And the loan commissioners shall at no time issue to any county, municipality or school districts any bonds created under this act or said act of Congress, without requiring from the officer or officers receiving the same, a bond as is required of the territorial treasurer, by section 6 of said act of Congress; and the said officer or officers shall give such bond, and no bonds shall be issued to any county, municipality or school district except in exchange for the bonds, warrants or other evidences of indebtedness for the redemption of which the refunding bonds were issued.

SEC. 9. Each county, municipality and school district shall pay into the territorial treasury its *pro rata* of the costs and

expenses incurred and paid by the Territory for the refunding, redeeming and payment of the indebtedness of said county, municipality or school district.

SEC. 10. This act shall take effect and be in force from and after its passage.

Approved March 19, 1891.

VAIL *v.* TERRITORY OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 67. Argued November 15, 1907.—Decided December 2, 1907.

Stare decisis is a wholesome doctrine, and, while not of universal application, is especially applicable to decisions affirming the validity of securities authorized by statute. Such decisions should be regarded as conclusive even as to those not strictly parties so as to prevent wrong to innocent holders who purchased in reliance thereon.

Where bonds of a county have been declared valid in a suit of which the county had knowledge, and was heard although not a party thereto, while the question may not be *res judicata* as against the county in a subsequent suit in which it is a party, under the doctrine of *stare decisis* the question should no longer be considered an open one.

The decisions of this court in *Utter* v. *Franklin*, 172 U. S. 416, and *Murphy* v. *Utter*, 186 U. S. 95, adhered to under the doctrine of *stare decisis*.

85 Pac. Rep. 652, affirmed.

THE facts are stated in the opinion.

Mr. Samuel L. Kingan, with whom *Mr. William Herring* was on the brief, for appellants:

The Supreme Court of Arizona felt bound upon all points raised in this case, save one, by the rule of *stare decisis*, that one being the compulsory character of the act. The rule was held applicable not by reason of the former decisions of the Arizona court, but because of the decisions of this court, and evidently the decisions in the mind of the court were *Utter* v. *Franklin*, 172 U. S. 416, and *Murphy* v. *Utter*, 186 U. S. 95. The Arizona court quite misconceived the meaning of *stare decisis* and the effects of the rule.

Not only must the point have been adjudicated, but it would appear that the precise point must have been agitated. By this we mean: That if it appear that the court should not have had presented to it a certain precise point in the earlier case, but such is presented in the case in being, the former case is not *stare decisis*. *Hart* v. *Burnett*, 15 California, 598; *Foxcroft* v. *Mallett*, 4 How. 355; *Boyd* v. *Alabama*, 94 U. S. 648.

The question of the validity, under the Constitution, of the acts of Arizona and of Congress was not presented, considered or adjudicated in *Utter* v. *Franklin*, 172 U. S. 416, nor in *Murphy* v. *Utter*, 186 U. S. 95. The doctrine of *stare decisis* does not apply.

Nor is the doctrine of *res judicata*, as distinguished from *stare decisis*, applicable. The estoppel can only apply as between the same parties and their privies, and upon the same claim or demand, and which particular demand or claim has been contested. The parties to the suits of *Utter* v. *Franklin* and *Murphy* v. *Utter*, *supra*, were Utter and his privies and the loan commission of Arizona and its privies, and they would be bound upon only contested points, upon the same claims and demands. In this action Utter and his privies are not parties; the action is between the Territory of Arizona and Pima County; the claim and demand is entirely different, and the issues here have not been contested in any suit or court. *Outram* v. *Morewood*, 3 East, 346—opinion of Lord Ellenborough;

Carter v. *James*, 13 M. & W. 137–147; *Cromwell* v. *County of Sac*, 94 U. S. 351–353, 356, 361 and 363; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610, 617; *Davis* v. *Brown*, 94 U. S. 423, 428; *Craft* v. *Perkins*, 83 Georgia, 760; *Howard* v. *Kimball*, 65 Maine, 308; *Smith* v. *Sherwood*, 4 Connecticut, 276; *Watts* v. *Watts*, 160 Massachusetts, 464; *Jacobson* v. *Miller*, 41 Michigan, 90—opinion by Cooley.

Mr. William C. Prentiss, with whom *Mr. E. S. Clark* and *Mr. Horace F. Clark*, were on the brief, for appellee.

Mr. Justice Brewer delivered the opinion of the court.

This was an application by the appellee, the Territory of Arizona, for a mandamus to compel the appellants, the supervisors of Pima County, to levy a tax to pay the interest due on certain bonds. The facts are these: In 1883 an act was passed by the territorial legislature (Laws Ariz., 1883, p. 61), directing Pima County to exchange its bonds for those of the Arizona Narrow Gauge Railroad Company. The amount of the bonds and the conditions of exchange were specified in the act. One hundred and fifty thousand dollars of bonds were so exchanged. Pima County denied its liability on the bonds, refused to pay the interest coupons and an action was brought thereon, which finally reached this court. *Lewis* v. *Pima County*, 155 U. S. 54. The act was held to be in violation of the restrictions imposed upon territorial legislatures by § 1889, Rev. Stat., as amended by the act of Congress of June 8, 1878, chap. 168 (20 Stat. 101), and the bonds were adjudged void. Subsequently, by acts of Congress and the territorial legislature, provision was made for the issue of Territorial, in exchange for these, bonds and for the payment of the principal and interest thereof by the county. The validity of this legislation came before us in *Utter* v. *Franklin*, 172 U. S. 416, where the different acts are fully stated. We sustained it, and adjudged that it was the duty of the loan commissioners to re-

fund the bonds. In *Murphy* v. *Utter*, 186 U. S. 95, the ruling was reaffirmed, and it was held that neither a change in the personnel of the loan commission nor an act of the legislature of Arizona abolishing the commission put an end to the duty of refunding.

The refunding having been made, the Territory thereafter called upon Pima County to pay the interest which the Territory had paid on the funded bonds. Upon its refusal to pay, this application was made to the Supreme Court of the Territory and it granted a mandamus, and from that decision the appellants have brought the case here. They challenge the validity of the refunding legislation, while the appellee contends that the matter is *res judicata*, or if not should, upon the doctrine of *stare decisis*, be regarded as foreclosed. In the two cases, 172 and 186 U. S., in which the validity of the refunding legislation was considered, Pima County was not nominally a party. The actions were brought by the holders of the bonds against the loan commission. Whether the county was technically bound by the decisions may be a question. It was heard by its attorney in the litigation, and was the party ultimately to be affected by the refunding. *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273. But if it be not so bound, still under the doctrine of *stare decisis* the question should no longer be considered an open one. The county had full knowledge of the entire litigation, having been a party in the first action and been represented by its attorney in the last two. Any defense which could be made to the refunding of the bonds and the validity of the refunding legislation could have been raised in the last cases. This court considered every question that was presented, determined that the legislation was valid, and ordered that the bonds should be refunded. They have been refunded. They have gone into the channels of trade, and now after many years—for the case of *Utter* v. *Franklin* was decided in 1899—and when it is fair to presume that many have bought, relying upon the conclusiveness of the adjudication by this court, it might work a grievous wrong to overthrow those decisions and

hold the bonds void. *Stare decisis* is a wholesome doctrine. It is not of universal application, and there have been cases where a ruling once made was wisely changed; but when the decision is one affirming the validity of bonds, notes or bills of a limited amount, the issue of which had been in terms authorized by statute, such decision should generally be held conclusive, even as to those not strictly parties to the litigation, for otherwise, as we have said, much wrong might be done to innocent holders who bought in reliance upon the decision. We are of the opinion that the Supreme Court of Arizona was right, and its judgment is

Affirmed.